

DIGEST OF  
UNITED STATES PRACTICE  
IN INTERNATIONAL LAW

2001



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UNITED STATES PRACTICE  
IN INTERNATIONAL LAW

2001

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*Editors*

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United States Department of State



INTERNATIONAL LAW INSTITUTE

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# Preface

I believe that the resumption of publication of the *Digest of United States Practice in International Law* for the calendar year 2000, after a lapse of many years, has been a great success, and expect that the same will be the case for this volume for the calendar year 2001.

Don Wallace, Jr.  
*Chairman*  
*International Law Institute*



# Introduction

The past year will likely prove to have been a watershed in the development of international law. In this field, as in so many other ways, the tragic, traumatic events of September 11 altered the landscape of U.S. practice. Issues of use of force, self-defense, and counter-terrorism, which have always been important, have posed unforeseen challenges in unanticipated contexts. Policy makers have been confronted by new questions related to humanitarian law, the law of war, and international criminal law. The various domestic and international responses to terrorism, including economic and trade sanctions, the freezing and seizing of assets, claims for compensation, and civil litigation, have each generated new and unique problems, to which the legal responses continue to develop.

At the same time, 2001 witnessed many other significant developments not directly related to the events of September 11, both through United States participation in international fora and developments in the application of international law in the United States. These cover the full range of topics in international legal practice, from treaties to consular affairs, the environment, and private international law.

These events and developments underscore the importance of making available, on a timely basis, documents and other information about current U.S. practice in international law for use by practitioners, academics and the interested public. As I wrote in the introduction to the 2000 *Digest of United States Practice in International Law*, which was published earlier this year, our goal in renewing publication of the *Digest* is to provide broad coverage of significant developments soon after the end of the covered year. With publication of this second volume, we are moving closer to achieving that goal.

The 2000 *Digest* has been well-received. In the current volume, we have continued to refine both the content and the organization of the *Digest*. We continue to welcome comments from

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readers in order to make this publication even more useful. Readers will note that a separate Chapter 19 is included to deal specifically with developments related to September 11 and the responses to international terrorism. Additional efforts have been made to identify and include documents prepared by other departments and agencies of the United States Government.

While moving ahead with current year volumes, we are also reaching backward to fill in the years since publication of the *Cumulative Digest* volumes that covered the years 1981–88, produced by our late colleague Marion Nash Leich in 1995. We anticipate publication of the 1989–90 volume early in 2003, and we are already at work on a multi-volume set covering 1991–99.

The enormity of this undertaking will not be lost on any reader of this series. Once again, I want to express my personal gratitude to the editors of the *Digest*, Sally Cummins and David Stewart, and to all the other members of the Office of the Legal Adviser who have contributed their time, effort and skill to the preparation and production of these volumes. The *Digest* is truly a collective project of the Office of the Legal Adviser. Worthy of particular mention are the following volunteers who have devoted special efforts to the *Digest* project: Elizabeth Amory, Violanda Botet, David Bowker, Gilda Brancato, Harold Burman, Ashley Deeks, Odell Dehart, Carol Epstein, Katherine Gorove, Steven Hill, Duncan Hollis, Melanie Khanna, Sovaida Ma'ani, Mary Catherine Malin, Denise Manning, Michael Mattler, Eric Pelofsky, J. Ashley Roach, John Schnitker, Nina Schou, Bernie Seward and Kathleen Wilson. A special note of thanks goes to our assistant law librarian, Joan Sherer, who has contributed immeasurably through research, cite checking, proofreading and other essential tasks to the current volume. We also appreciate the support, cooperation and seasoned insights of the Assistant and Deputy Legal Advisers.

Our collaboration with the International Law Institute continues to be the cornerstone of this effort. The Institute's Director of Publishing, Peter B. Whitten, and its Chairman, Prof. Don Wallace, Jr., have our sincere thanks for their support and guidance.

William H. Taft, IV  
*The Legal Adviser*  
*Department of State*

## Note from the Editors

We are pleased to have participated in the publication of the *Digest of United States Practice in International Law* for the calendar year 2001. We hope you will find it useful as a source of current information on the views and practice of the Government of the United States in public and private international law.

We want to add our thanks to those of the Legal Adviser for all the assistance from everyone in the Office of the Legal Adviser and from other offices and departments in the U.S. Government who contributed to the preparation of the 2001 volume. If this undertaking were not a cooperative venture, it would never exist. We also want to thank Peter B. Whitten, the International Law Institute's director of publishing, and Professor Don Wallace, Jr., chairman of the Institute, for their valuable support and guidance.

This volume continues the approach adopted for the 2000 *Digest*. A few organizational refinements have been made, reflecting both lessons learned from the first volume and new issues in the 2001 materials. As a result, several chapters have been reorganized and we have added three chapters. The new chapters include Educational and Cultural Affairs (Chapter 14), International Conflict Resolution and Avoidance (Chapter 17) and U.S. Response to Terrorist Attacks (Chapter 19). The decision to create Chapter 19 reflects our determination to present materials in a way that will be most useful and accessible to the reader. It pulls together materials related to the September 11, 2001 attacks rather than distributing them among the other relevant chapters, including Chapters 3, 16 and 18. There may well be different events and issues in other years that will occasion their own special chapters of one or more years' duration.

A few words may be useful on the internet citations that direct readers to full texts of documents excerpted here. We know that

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such sources are subject to change. That is a process over which we have very little control, but we have provided the best citation available at the time of publication. As was done for 2000, documents not available elsewhere are available through the State Department website, at [www.state.gov/s/l](http://www.state.gov/s/l).

We should also note that we have not generally provided an internet address for sources such as provisions of the United States Code and published U.S. federal and state court decisions that are readily available both in hard copy and from various online services. In addition to the various existing commercial services, the federal government has a number of sites that may be of particular value. The government's "official web portal" is [www.firstgov.gov](http://www.firstgov.gov), with links to a wide range of government agencies and other sites. Also, [www.access.gpo.gov/su\\_docs/databases.html](http://www.access.gpo.gov/su_docs/databases.html) provides links that include the Federal Register, Congressional Record, U.S. Code, Code of Federal Regulations, Weekly Compilation of Presidential Documents, Congressional Committee Reports and Prints, and Public Laws. Links to individual federal court web sites are provided at [www.uscourts.gov/links.html](http://www.uscourts.gov/links.html); availability of decisions varies from court to court. The official Supreme Court web site is available at [www.supremecourtus.gov](http://www.supremecourtus.gov).

Selections of material in this volume were made based on judgments about the significance of the issues, their possible relevance for future situations, and their likely interest to scholars and other academics, government lawyers and private practitioners.

As the new *Digest* continues to evolve, we welcome the reactions of readers and users on the content as well as the organization.



# CHAPTER 1

## Nationality, Citizenship and Immigration

### A. NATIONALITY AND CITIZENSHIP

#### 1. Determination of U.S. Citizenship: North Korea

Beginning in February 2000, the Democratic People's Republic of Korea ("DPRK") denied consular access to a U.S. citizen imprisoned in the DPRK on the grounds that he had renounced his U.S. citizenship by requesting asylum and applying for DPRK nationality in 1991. The United States had been unable to confirm these facts directly with the individual involved. Moreover, acquisition of DPRK nationality would not necessarily result in loss of U.S. citizenship.

Because the United States has no diplomatic relations with the DPRK, the request for consular access was made by the Embassy of Sweden in Pyongyang on behalf of the United States as its protecting power. In a telegram of September 11, 2000, to the U.S. Embassy in Beijing, the Department of State set forth the views of the United States on the citizenship issue, to be provided to the Swedish government for presentation to the DPRK. Excerpts from the telegram are set forth below. Identifying information has been deleted. Despite a further official request in March 2001, the DPRK had still not provided consular access to the U.S. citizen in question as of the end of 2001.

The full text of the telegram is available at [www.state.gov/s/l](http://www.state.gov/s/l).

The United States of America does not question the right of the DPRK to grant DPRK citizenship to persons applying for naturalization.

At issue, however, is the right of the DPRK to determine who is and is not a citizen of the United States, and to deprive arbitrarily [the citizen in question] of United States citizenship and consular protection. . . . [O]nly the United States of America may determine who is a citizen of the United States. If, as asserted in the Ministry's note, [a citizen] wishes to divest himself of United States citizenship of his own free will, he must do so in accordance with the laws and regulations of the United States. Until this occurs, he is, and will continue to be, a citizen of the United States of America. . . .

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The Congress of the United States is vested with the authority to enact legislation concerning U.S. nationality, and to set criteria for acquisition or loss of U.S. citizenship. Accordingly, [the citizen] acquired the citizenship of the United States of America . . . when he was naturalized as a U.S. citizen on his own application and issued U.S. naturalization certificate no. [ ]. . . .

The United States has recognized the right of expatriation as an inherent right of all people. Citizens of the United States can expatriate themselves through the voluntary performance of a statutorily specified expatriating act with the intention of relinquishing citizenship. A person may possess or even acquire another nationality and nonetheless retain U.S. citizenship. In fact, current U.S. policy is generally to assume that a U.S. citizen intends to retain U.S. citizenship when he or she acquires a foreign nationality, unless the citizen expressly states otherwise.

Section 349 of the Immigration and Nationality Act (Title 8 U.S. Code 1481) states that U.S. citizens are subject to loss of citizenship if they perform certain acts voluntarily with the intention of relinquishing U.S. nationality. A finding of loss of U.S. nationality is made by the U.S. Department of State only after the individual makes a statement before a U.S. consular officer abroad regarding his or her intentions in performing the statutory expatriating act, or if the individual formally renounces U.S. citizen-

ship before a U.S. consular officer abroad. No finding of loss of U.S. citizenship has ever been made with respect to [the citizen in question]; accordingly, he is still a U.S. citizen under U.S. and international law, and will remain so until such time as he expatriates himself in a manner prescribed by Title 8 U.S. Code section 1481.

The principle that a country shall determine who is a national of that country is a concept universally recognized under international law. Accordingly, the United States of America, through the Swedish protecting power, respectfully reasserts its requests for consular access to [the] U.S. citizen. This will assist in clarifying [the citizen's] intentions with respect to U.S. citizenship and reassure his family regarding his well being. The Swedish protecting power would interview [the citizen] regarding his intentions with respect to U.S. citizenship and his welfare. His mother and sister continue to contact the U.S. Department of State for assistance in obtaining information about his welfare.

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## **2. Child Citizenship Act of 2000**

The Child Citizenship Act of 2000, Pub. L. No. 106–395, 114 Stat. 1631 (“the Act”), was signed into law on October 30, 2000 and became effective on February 27, 2001. As described in excerpts below from a telegram of January 18, 2001, to all U.S. diplomatic and consular posts, the Act (1) facilitates the automatic acquisition of U.S. citizenship by children of U.S. citizens who are born abroad and who do not acquire citizenship at birth in cases where the child (including an adopted child), having been lawfully admitted for permanent residence, resides in the United States in the legal and physical custody of a citizen parent; and (2) facilitates the naturalization of, and acquisition of certificates of citizenship by, children who are similarly situated but who reside abroad and enter the United States only temporarily.

The full text of the telegram is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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### **INA Section 320: Automatic acquisition of U.S. citizenship for some children**

. . . Section 101 of the [Child Citizenship Act of 2000 (“the Act”)] amends INA section 320 so that “(a) child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:

(1) at least one parent of the child is a citizen of the United states, whether by birth or naturalization.

(2) the child is under the age of eighteen years.

(3) the child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence [“LPR”].

(b) subsection (a) shall apply to a child adopted by a United States citizen if the child satisfies the requirements applicable to adopted children under section 101(b)(1)—”

### **INA section 322: Certificate of citizenship to children who reside abroad**

3. Section 102 of the act serves to amend INA section 322 in the following manner: “(a) a parent who is a citizen of the United States may apply for naturalization on behalf of a child born outside of the United States who has not acquired citizenship automatically under section 320. The Attorney General shall issue a certificate of citizenship to such parent upon proof, to the satisfaction of the Attorney General, that the following conditions have been fulfilled:

(1) at least one parent is a citizen of the United States, whether by birth or naturalization.

(2) the United States citizen parent— (a) has been physically present in the United States or its outlying possessions for a period or periods totaling not less than five years, at least two of which were after attaining the age of fourteen years; or (b) has a citizen parent who has been physically present in the United States or its outlying possessions for a period or periods totaling not less than

five years, at least two of which were after attaining the age of fourteen years.

(3) the child is under the age of eighteen years.

(4) the child is residing outside of the United States in the legal and physical custody of the citizen parent, is temporarily present in the United States pursuant to a lawful admission, and is maintaining such lawful status.

(b) upon approval of the application (which may be filed from abroad) and, except as provided in the last sentence of section 337(a), upon taking and subscribing before an officer of the service within the United States to the oath of allegiance required by this Act of an applicant for naturalization, the child shall become a citizen of the United States and shall be furnished by the Attorney General with a certificate of citizenship.

(c) subsections (a) and (b) shall apply to a child adopted by a United States citizen parent if the child satisfies the requirements applicable to adopted children under section 101(b)(1).”

4. Posts will note that INA section 322 continues to apply only to children who reside abroad and who are only temporarily in the U.S. pursuant to a lawful admission.

## INA section 321 repealed

5. Section 103 of H.R. 2883 repeals in its entirety INA Section 321 (“Child born outside of United States of alien parent; conditions under which citizenship automatically acquired”).

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## Q’s and A’s

7. *Q: does this legislation change the manner by which children adopted overseas by American citizens are brought into the United States?*

A: No.

*Q: Does section 320 apply to foreign-born children who are adopted in the U.S. as well as those who have been adopted abroad?*

A: Yes, as long as the child meets the requirements of INA sections 101(b)(1)(e) or (f) and was admitted into the U.S. as a LPR.

\* \* \* \*

*Q: Will a child's claim to citizenship pursuant to amended section 320 be adversely affected by the fact that s/he returns overseas after having been admitted into the U.S. as a LPR but prior to being documented with a passport or certificate of citizenship? Can post issue a passport in these circumstances?*

A: Yes, a passport can be issued. Again, the child's claim to U.S. citizenship vests as soon as the three conditions set out in section 320 are satisfied. The Department is of the view that the residence requirements of the new law are met as soon as INS admits the child Stateside as a LPR. Such an interpretation, we believe, is consistent with the intent of Congress to streamline the acquisition of citizenship in these cases.

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*Q: Will foreign service posts issue reports of birth for children who acquire citizenship under amended section 320?*

A: No. Reports of birth are issued only to children who acquire citizenship pursuant to Chapter 1 ("nationality at birth and by collective naturalization") of Title III of the INA. Citizenship acquired by virtue of section 320 is deemed naturalization in accordance with Chapter 2 of Title III of the INA.

*Q: Can children who heretofore have not been documented as American citizens but who now meet the requirements of section 320 be documented as American citizens?*

A: Yes.

*Q: What happens if a child has LPR status and otherwise meets the conditions of section 320 but is currently temporarily overseas?*

A: The child acquires citizenship automatically under section 320 as soon as s/he is next admitted stateside as a LPR, provided that s/he is under the age of 18 at the time of admission.

*Q: Can posts issue an [non-immigrant visa ("NIV")] to a child so as to enable her/him to acquire a certificate of citizenship pursuant to amended section 322?*

A: Yes, provided the child demonstrates an intent to return to a residence abroad after a temporary visit to the U.S.

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### 3. Naturalization of Foreign-born Child of Unwed Parents, Only One of Whom is an American Citizen

In *Tuah Anh Nguyen v. Immigration and Naturalization Service*, the United States urged the U.S. Supreme Court to uphold the constitutionality of § 309 of the Immigration and Nationality Act, 8 U.S.C. § 1409. (See also *Digest* 2000, Chapter 1.A.) That provision establishes different conditions under which unwed American citizen men and women may transmit U.S. citizenship to their children born abroad when the other parent is not an American citizen. On June 11, 2001, the Supreme Court, by a 5-4 majority, upheld the statute. *Tuah Anh Nguyen v. Immigration and Naturalization Service*, 533 U.S. 53 (2001). After reviewing the elements of the relevant statutory requirements, the Court concluded as follows:

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The statutory distinction relevant in this case . . . is that § 1409(a)(4) requires one of three affirmative steps to be taken if the citizen parent is the father, but not if the citizen parent is the mother: legitimation; a declaration of paternity under oath by the father; or a court order of paternity. Congress' decision to impose requirements on unmarried fathers that differ from those on unmarried mothers is based on the significant difference between their respective relationships to the potential citizen at the time of birth. [533 U.S. at 62.]

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Congress is well within its authority in refusing, absent proof of at least the opportunity for the development of a relationship between citizen parent and child, to commit this country to embracing a child as a citizen entitled as of birth to the full protection of the United States, to the absolute right to enter its borders, and to full participation in the political process. If citizenship is to be conferred . . . so that its acquisition abroad bears little relation to the realities of the child's own ties and allegiances, it is for Congress, not this Court, to make that determination. Congress has not taken that path but has instead chosen, by means of § 1409, to ensure in the case of father and child the opportunity which the event of birth itself provides for the mother and

child. It should be unobjectionable for Congress to require some evidence of a minimal opportunity for the development of a relationship with the child in terms the male can fulfill. [*Id.* at 67.]

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. . . The distinction embodied in the statutory scheme here at issue is not marked by misconception and prejudice, nor does it show disrespect for either class. The difference between men and women in relation to the birth process is a real one, and the principle of equal protection does not forbid Congress to address the problem at hand in a manner specific to each gender. [*Id.* at 73.]

## **B. PASSPORTS**

### **1. Two-Parent Consent to Passport Issuance**

On June 4, 2001, the Department of State promulgated its final rule implementing § 236 of the Admiral James W. Nance and Meg Donovan Foreign Relations Authorization Act, Pub. L. No. 106–113, 113 Stat. 1501A-430, 22 U.S.C. § 213n. 66 Fed. Reg. 29904 (June 4, 2001). In an effort to deter parental child abduction, the statute required, with limited exceptions, that the Department adopt a policy of not issuing passports to children under age 14 unless both parents signed the passport application. Under the regulation, parents are required to provide documentary evidence of parentage showing the minor's name, date and place of birth, and the names of the parent or parents. The regulation provides for execution of a passport by one parent or legal guardian "if such person provides, under penalty of perjury: (A) Documentary evidence that such person is the sole parent or has sole custody of the child; or (B) A written statement of consent from the non-applying parent or guardian, if applicable, to the issuance of the passport." It also provides that an individual may apply *in loco parentis* on behalf of a minor under age 14 "by submitting a notarized written statement or a notarized affidavit from both parents specifically authorizing the application. However, if only one parent provides the notarized written statement or notarized affidavit, documentary



evidence that such parent has sole custody of the child must be presented.” The regulation provides for waiver in cases of exigent or special family circumstances, defined as “time-sensitive circumstances in which the inability of the minor to obtain a passport would jeopardize the health and safety or welfare of the minor or would result in the child being separated from the rest of his or her traveling party.”

The Department explained the new regulation as follows in its Federal Register notice.

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In crafting the regulations to implement the statute uniformly and fairly, the Department sought to implement the statute in a way that will: (1) use the passport application process as a vehicle for deterring parental child abduction; (2) minimize any unnecessary inconvenience to parents in the majority of cases that do not involve parental abduction issues; and (3) fulfill the Department’s responsibilities for passport issuance and the protection of U.S. citizens abroad. We feel that the final regulation meets those goals. A central feature of the regulation is that it puts the full burden of responsibility for the bona fides of the documentation submitted and the truthfulness of representations made therein on the applying parent or legal guardian, who will be subject to criminal penalties for making false statements to procure a passport. Although not obligated to do so in any particular case, the Department reserves its right to investigate or verify the truthfulness of assertions made during the application process, or to confirm the validity of documents presented in support of the application.

## **2. Denial of Passports for Non-Payment of Child Support**

Pursuant to legislation enacted in 1996 as part of that year’s welfare reform efforts, the Secretary of State is required to deny (or, as appropriate, revoke, restrict or limit) passports of persons certified by the Secretary of Health and Human Services, on the basis of an underlying certification of a state agency, as owing child support arrearages in excess of \$5,000. Personal Responsibility and Work Opportunity Reconciliation

Act of 1996, Pub. L. No. 104-193, § 370, 110 Stat. 2105, 42 U.S.C. § 652(k). The Department of State accordingly promulgated implementing regulations, at 22 CFR § 51.70(a)(8) (2001). As a result of the new procedures, the Department of Health and Human Services has reported incidents in which significant arrearages have been paid due directly to denial of passports on this basis.

In recent years, various persons have unsuccessfully challenged the constitutionality of such denial of passports. In April 2001 the United States filed a motion to dismiss a constitutional challenge to the passport provisions in *Bowes v. Ashcroft*, Civil Action No. 00-CV-12557 (NG), filed in the U.S. District Court of the District of Massachusetts by a number of non-custodial parents and three non-profit corporations. The excerpts below from the Memorandum of Reasons in Support of Defendants' Motion to Dismiss provide the views of the United States on that aspect of the case. The district court granted the government's motion to dismiss in an unpublished order dated October 22, 2001.

The full text of the Memorandum is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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. . . [P]laintiffs challenge 42 U.S.C. § 652(k) and its implementing regulation, 22 C.F.R. § 51.70(a)(8), (collectively, "passport provisions"), which provide for the denial of passports to certain individuals owing in excess of \$5,000 in outstanding child support. Section 652(k) was enacted in 1996 as part of the welfare reform legislation enacted that year. PRWORA. *See* Pub. L. No. 104-193, § 370, 110 Stat. 2105, 2251-52 (1996). Section 652(k) provides:

(1) If the Secretary [of Health and Human Services] receives a certification by a State agency in accordance with the requirements of section 654(31) of this title that an individual owes arrearages of child support in an amount exceeding \$5,000, the Secretary shall transmit such certification to the Secretary of State for action (with respect to denial, revocation, or limitation of passports) pursuant to paragraph (2).

(2) The Secretary of State shall, upon certification by the Secretary transmitted under paragraph (1), refuse to issue a passport to such individual, and may revoke, restrict, or limit a passport issued previously to such individual.

(3) The Secretary and the Secretary of State shall not be liable to an individual for any action with respect to a certification by a State agency under this section.

42 U.S.C. § 652(k). The implementing regulation provides that the Secretary of State shall not issue a passport to any individual who has been “certified by the Secretary of Health and Human Services as notified by a State agency under 42 U.S.C. 652(k) to be in arrears of child support in an amount exceeding \$5,000.” 22 C.F.R. § 51.70(a)(8).

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While the right to international travel is part of the liberty interest protected by the due process clause, *Kent v. Dulles*, 357 U.S. 116, 127 (1958), it is not a fundamental right equivalent to the right to interstate travel. *Califano v. Aznavorian*, 439 U.S. 170, 176 (1978); *Hutchins v. District of Columbia*, 188 F.3d 531, 537 (D.C. Cir. 1999) (en banc); see also *Weinstein v. Albright*, 2000 WL 1154310, at \*5 (S.D.N.Y. 2000) (dismissing substantive due process challenge to passport provisions); *Eunique v. Albright*, CV 98-7787-GHK (SHx) (C.C. Cal. 1999), slip op. at 7 (same). . . . Accordingly, rational basis scrutiny applies. *Flores*, 507 U.S. at 303, 305–06; *Glucksberg*, 521 U.S. at 728; cf. *Haig v. Agee*, 453 U.S. 280, 306 (1981) (international travel subject to reasonable governmental regulation).<sup>9</sup> As the only two cases to consider the issue have held, the passport provisions easily sur-

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<sup>9</sup> *Aptheker v. Secretary of State*, 378 U.S. 500 (1964), is not to the contrary. There, the Supreme Court held that the denial of a passport to a Communist Party official solely because of his political affiliation was improper. To the extent that the Court applied more than simply rational basis review, it was because the basis upon which the passport restriction was imposed was an act protected by the First Amendment’s guarantees of freedom of association. *Id.* at 507; see *Eunique*, slip. op. at 6–7 (upholding passport provisions and distinguishing *Aptheker* because of First Amendment considerations in *Aptheker*). Because there is no independent Constitutional right to be in arrears on one’s child support obligations, *Aptheker* is inapplicable here.

vive rational basis scrutiny, as they serve to both encourage non-custodial parents to comply with their child support obligations and prevent such parents from fleeing the country. *Weinstein*, 2000 WL 1154310 \*6; *EunIQUE*, slip. op. at 8; cf. *Kent* 357 U.S. at 127, 130 (preventing lawbreakers from fleeing country is valid basis for passport restrictions). Because the passport restrictions are rationally related to the legitimate government interest of encouraging and enforcing support obligations, they do not violate plaintiff's substantive due process rights.

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#### **D. Plaintiffs' Ninth Amendment Claims Must Be Dismissed**

Plaintiffs challenge . . . the passport provisions pursuant to the Ninth Amendment. Amended Compl., Fourth Count. The Ninth Amendment provides that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." U.S. Const., Amend. IX. However, "[t]he Ninth Amendment . . . does not create substantive rights beyond those contained by governing law." *Vega-Rodriguez v. Puerto Rico Tele. Co.*, 110 F.3d 174, 182 (1st Cir. 1997); see also *Doe v. Bolton*, 410 U.S. 179, 210 (1973) (Douglas, J., concurring) ("The Ninth Amendment obviously does not create federally enforceable rights."); *San Diego Cty. Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1125 (9th Cir. 1996); *Gibson v. Matthews*, 926 F.2d 532, 537 (6th Cir. 1991). Accordingly, plaintiffs' Ninth Amendment claims must be dismissed.

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On August 10, 2001, the Second Circuit Court of Appeals affirmed a decision by the Southern District of New York dismissing a due process and equal protection challenge to the same passport provisions. *Weinstein v. Albright*, 261 F.3d 127 (2d Cir. 2001). As to the due process challenge, the court explained (internal citations and footnotes omitted):

In this case, plaintiff's right to international travel, which is undoubtedly restricted by the denial of his passport application and revocation of his previously issued pass-

port, is a protected liberty interest, a conclusion not disputed by defendants. . . . The question before the court is whether the procedures allowed for by the statutes and regulations are sufficient to protect plaintiff's interest.

*Id.* at 134. The court concluded that the lack of review by a federal agency was not a denial of due process in these cases because "despite the unavailability of federal review, we agree with the district court that the statutes and regulations comport with due process because they 'require that persons, such as the plaintiff, be provided [by the applicable state] with notice and an opportunity to be heard before a passport is denied or revoked based on arrearages in child support payments.'" *Id.* at 134–35.

The court also rejected an equal protection challenge based on assertions that all other denials of passports provide for a hearing at the federal level. In so doing, it noted again that "those owing child support arrears are the only class assured to have received prior notice of the passport consequences of, and an opportunity to contest, the state determination leading to the denial of the passport applications." *Id.* at 140–141.

### **3. Restrictions on Use of U.S. Passport**

#### ***a. Extension of Iraq passport restriction***

On February 28, 2001, Secretary of State Colin Powell signed a notice extending for a year the restriction on use of U.S. passports for travel to, in or through Iraq, originally imposed on February 1, 1991. 66 Fed. Reg. 14241 (March 9, 2001). The notice provided as follows:

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On February 1, 1991, pursuant to the authority of 22 U.S.C. 211a and Executive Order 11295 (31 FR 10603), and in accordance with 22 CFR 51.73 (a) (2) and (a) (3), all United States passports, with certain exceptions, were declared invalid for travel to, in, or through Iraq unless specifically validated for such travel.

The restriction was originally imposed because armed hostilities then were taking place in Iraq and Kuwait, and because there was an imminent danger to the safety of United States travelers to Iraq. American citizens then residing in Iraq and American professional reporters and journalists on assignment there were exempted from the restriction on the ground that such exemptions were in the national interest. The restriction has been extended for additional one-year periods since then, and was last extended through March 9, 2001.

Conditions in Iraq remain hazardous for Americans. Iraq continues to refuse to comply with UN Security Council resolutions to fully declare and destroy its weapons of mass destruction and missiles while mounting a virulent public campaign in which the United States is blamed for maintenance of U.N. sanctions. The United Nations has withdrawn all U.S. citizen UN humanitarian workers from Iraq because of the Government of Iraq's stated inability to protect their safety. Iraq regularly fires anti-aircraft artillery and surface-to-air missiles at U.S. and coalition aircraft patrolling the no-fly zones over northern and southern Iraq, and regularly illuminates U.S. and coalition aircraft with target-acquisition radar.

U.S. citizens and other foreigners working inside Kuwait near the Iraqi borders have been detained by Iraqi authorities in the past and sentenced to lengthy jail terms for alleged illegal entry into the country. Although our interests are represented by the Embassy of Poland in Baghdad, its ability to obtain consular access to detained U.S. citizens and to perform emergency services is constrained by Iraqi unwillingness to cooperate. In light of these circumstances and pursuant to the authorities set forth in 22 U.S.C. 211a, Executive Order 11295, and 22 CFR 51.73, I have determined that Iraq continues to be a country "where there is imminent danger to the public health or the physical safety of United States travelers."

Accordingly, United States passports shall continue to be invalid for use in, travel to, in, or through Iraq unless specifically validated for such travel under the authority of the Secretary of State. The restriction shall not apply to American citizens residing in Iraq on February 1, 1991, who continue to reside there, or to American professional reporters or journalists on assignment there.

**b. Extension of Libya passport restriction**

On November 13, 2001, Secretary Powell similarly extended the restriction on the use of United States passports for travel to, in or through Libya, originally imposed on December 11, 1981. 66 Fed. Reg. 58546 (Nov. 21, 2001).

**C. IMMIGRATION AND VISAS****1. Presidential Proclamation: Suspension of Entry**

Section 212(f) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1182(f), authorizes the President by Proclamation to “suspend the entry of all aliens or any class of aliens . . . or impose on the entry of aliens any restrictions he may deem to be appropriate” on a finding that their entry would be “detrimental to the interests of the United States.” On June 26, 2001, the President issued Proclamation 7452, “Suspension of Entry as Immigrants and Nonimmigrants of Persons Responsible for Actions That Threaten International Stabilization Efforts in the Western Balkans, and Persons Responsible for Wartime Atrocities in That Region,” excerpted below. 66 Fed. Reg. 34775 (June 29, 2001).

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The United States has a vital interest in assuring peace and stability in Europe. In the Western Balkans, the United States is engaged, together with North Atlantic Treaty Organization Allies, the Organization for Security and Cooperation in Europe, United Nations missions, the European Union, and other international organizations in an effort to achieve peace, stability, reconciliation, and democratic development and to facilitate the region’s integration into the European mainstream. The United States views full implementation of the Dayton Peace Accords in Bosnia and United Nations Security Council Resolution 1244 in Kosovo as critical to these efforts.

In furtherance of these objectives, the United States has provided military, diplomatic, financial, and logistical support to

international institutions established in the region and to civil and security authorities. The United States has a direct and significant interest in the success of such initiatives and in the safety of personnel involved in them, including numerous United States military and Government officials.

In light of these objectives, I have determined that it is in the interests of the United States to restrict the entry into the United States of persons responsible for actions that threaten international stabilization efforts in the Western Balkans region, and of persons responsible for wartime atrocities committed in that region since 1991.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by the authority vested in me by the Constitution and laws of the United States, including section 212(f) of the Immigration and Nationality Act of 1952, as amended (8 U.S.C. 1182(f)), and section 301 of title 3, United States Code, hereby find that the unrestricted immigrant and non-immigrant entry into the United States of persons described in section 1 of this proclamation would, except as provided for in sections 2 and 3 of this proclamation, be detrimental to the interests of the United States. I therefore hereby proclaim that:

Section 1. The immigrant and nonimmigrant entry into the United States of the following persons is hereby suspended:

(a) Persons who, through violent or other acts: (i) seek to obstruct the implementation of the Dayton Peace Accords (the “Dayton Agreements”) or United Nations Security Council Resolution 1244 of June 10, 1999; (ii) seek to undermine the authority or security of the United Nations Interim Administration Mission in Kosovo, the international security presence in Kosovo known as the Kosovo Force, the Office of the High Representative in Bosnia and Herzegovina, the international security presence in Bosnia known as the Stabilization Force, the Organization for Security and Cooperation in Europe, the International Criminal Tribunal for the former Yugoslavia, or other international organizations and entities present in the region pursuant to the Dayton Agreement or United Nations Security Council resolutions, including but not limited to Resolutions 827, 1031, and 1244; (iii) seek to intimidate or to prevent displaced persons or refugees from returning to their places of residence in any area or state of the



Western Balkans region; or (iv) otherwise seek to undermine peace, stability, reconciliation, or democratic development in any area or state of the Western Balkans region.

(b) Persons who are responsible for directing, planning, or carrying out wartime atrocities, including but not limited to acts in furtherance of “ethnic cleansing,” committed in any area or state of the Western Balkans region since 1991.

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## 2. Visa Sanctions for Non-Acceptance of Return of Nationals

On June 28, 2001, the U.S. Supreme Court held in *Zadvydas v. Davis*, 533 U.S. 678 (2001), that the Immigration and Naturalization Service (“INS”) may detain aliens under relevant law with final orders of removal only for a period reasonably necessary to bring about that alien’s removal from the United States. As the Court explained,

[t]he post-removal-period detention statute applies to certain categories of aliens who have been ordered removed, namely inadmissible aliens, criminal aliens, aliens who have violated their nonimmigrant status conditions, and aliens removable for certain national security or foreign relations reasons, as well as any alien “who has been determined by the Attorney General to be a risk to the community or unlikely to comply with the order of removal.” (8 U.S.C. § 1231 (a) (6) (1994 ed., Supp. V); see also 8 CFR § 241.4(a) (2001). It says that an alien who falls into one of these categories “may be detained beyond the removal period and, if released, shall be subject to [certain] terms of supervision.” 8 U.S.C. § 1231 (a) (6) (1994 ed., Supp. V).

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A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment’s Due Process Clause forbids the Government to “deprive” any “person . . . of . . . liberty . . . without due process of law.”

*Id.* at 688–689. Under the Court’s decision an alien must be released when the alien’s removal from the United States is no longer reasonably foreseeable. The Court held that detention of such aliens for up to six months after a removal order is final is “presumptively reasonable.” *Id.* at 701.

This decision significantly affected the INS’s ability to detain aliens who had been ordered deported but whom the INS had been unable to remove because of questions of the alien’s identity or nationality or reluctance or inability by the alien’s government to provide travel documents.

In response to the decision, the Department of Justice and the Department of State intensified efforts to convince countries to fulfill their obligations to accept return of their nationals. On September 7, 2001, the Department of Justice invoked the authority of § 243(d) of the Immigration and Nationality Act, 8 U.S.C. §1253(d), as to the country of Guyana. Section 1253(d) requires that, when notified by the Attorney General that the government of a foreign country “denies or unreasonably delays accepting an alien who is a citizen, subject, national, or resident of that country after the Attorney General asks whether the government will accept the alien,” the Secretary of State must “order consular officers in that foreign country to discontinue granting immigrant visas or nonimmigrant visas, or both,” to the country’s citizens, subjects, nationals and residents. In a press release, the Department of Justice explained the action as follows.

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The Department of Justice, in a letter to the State Department, today formally invoked its statutory authority to require the Secretary of State to discontinue granting visas to citizens, subjects, nationals and residents of Guyana due to Guyana’s failure to accept the return of its nationals who have been ordered deported from the United States. The government of Guyana can avoid sanctions by accepting repatriation of these citizens within the next thirty days.

The action was taken in response to the Supreme Court’s decision in *Zadvydas v. Davis* which held that the U.S. government generally may not detain indefinitely aliens who have been ordered deported but that the Immigration and Naturalization Service

(INS) has not been able to remove. The INS is currently holding in custody more than 100 nationals of Guyana who have been ordered deported because of the crimes they have committed in the United States and who have been determined by the INS to be dangerous.

The Department of Justice exercised its authority for the first time after numerous requests to cooperatively resolve the problem failed.

If the Department of Justice receives information that the government of Guyana accepts the return of its aliens, it will ask the State Department to lift the sanction.

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When the Government of Guyana failed to meet the thirty-day deadline, the Secretary of State discontinued the granting of nonimmigrant visas in Guyana to certain categories of nationals of Guyana. Excerpts below from a telegram to the American Embassy in Georgetown, Guyana, of October 10, 2001, explain the sanctions being imposed. On December 14, 2001, the Department of State received written notification from the Department of Justice that the Government of Guyana had met the requirements of § 243(d). The imposition of visa suspensions ceased on the same day.

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2. As post is aware . . . , on September 7, 2001, Attorney General Ashcroft notified the Secretary of State that the Republic of Guyana has denied or unreasonably delayed the return of 113 aliens to that country. Therefore, pursuant to Section 243(d) of the Immigration and Nationality Act (INA), the Secretary has ordered, effective October 10, 2001, consular officers in Guyana to discontinue granting nonimmigrant visas, consistent with paragraphs four and five, below, to certain nationals of that country. Visas should be denied, in response to this telegram, under section 243(d) INA.

3. In addition, if the GOG continues to refuse or unreasonably delay the return of its nationals, the sanctions will be expanded to include all Guyanese, and eventually all persons res-

ident in Guyana. Post should note that Section 243(d) applies only to visa issuance in Guyana and that, therefore, otherwise eligible applicants affected by the discontinuance in Guyana could still be issued visas outside Guyana.

4. The Secretary has approved the discontinuance of the issuance, initially, of nonimmigrant visas to the following categories to nationals of the Republic of Guyana beginning October 10, 2001:

(1) Except as provided in (2), below, nonimmigrant visas shall not be issued to:

(A) officials or employees of the Government of Guyana, the Parliament and the judiciary, and their spouses and children, whether minor or adult; and

(B) officers or employees of any company owned in whole or in substantial part by the Government of Guyana, including but not limited to the Guyana Sugar Corporation. Guyoil, and the Guyana National Cooperative Bank, and their spouses and children, whether minor or adult.

(2) The suspension of nonimmigrant visa issuance shall not apply to persons described in (1) who are:

(A) traveling to the United Nations in New York and whose entry must be permitted under the United Nations Headquarters Agreement or for foreign policy reasons, or

(B) traveling to the Organization of American States in Washington and whose entry must be permitted under the Organization of American States Headquarters Agreement or for foreign policy reasons, or

(C) eligible for "A" (bilateral diplomatic) visas, when issuance is specifically authorized by the Department, or

(D) specifically authorized by the Department to receive visas in furtherance of U.S. foreign policy or law enforcement objectives.

\* \* \* \*

## **Cross-references**

*Homeland Security Directive concerning immigration policies,*  
**Chapter 19.C.5.b.**

*Consular and immigration issues in USA PATRIOT Act,* **Chapter 19.C.4.b.**

## CHAPTER 2

# Consular and Judicial Assistance and Related Issues

### A. CONSULAR NOTIFICATION, ACCESS AND ASSISTANCE

#### 1. Claims by Germany against the United States in the International Court of Justice: *The LaGrand Case*

On June 27, 2001 the International Court of Justice announced its decision in *The LaGrand Case (Germany v. U.S.)*. Germany filed its case on March 2, 1999, seeking, inter alia, to void the convictions and sentences imposed by Arizona on two German national brothers on the grounds that the United States had failed, as required by Article 36(1)(b) of the Vienna Convention on Consular Relations, to inform the brothers that they had the right to have a German consular post notified of their arrest and detention. When Germany filed the case on March 2, 1999, one of the brothers had already been executed, and Germany also requested an indication of provisional measures to stop the execution of the second brother, scheduled for March 3, 1999. On March 3, 1999, less than four hours before the scheduled execution, the ICJ issued an order of provisional measures stating that the United States “should take all measures at its disposal” to stop the execution and “should transmit this Order to the Governor of the State of Arizona.” The ICJ Order was transmitted by the Department of State to the Governor of Arizona. The execution took place later that day.

In its Counter-Memorial, filed with the ICJ on March 27, 2000, and in oral pleadings before the ICJ November 14–17,

2000, the United States noted that the arresting officials had reason to believe that the brothers were U.S. citizens at the time of their arrest (e.g., one brother expressly identified himself as a U.S. citizen). The U.S. acknowledged that the brothers' true nationality became known eventually to relevant Arizona authorities and that there was, as of that time, a breach of the U.S. obligation under Article 36(1)(b) to inform the LaGrand brothers that they could ask that a German consular post be notified of their arrest and detention. The United States further noted that, consistent with state practice in such instances, the United States had thoroughly investigated the case, had apologized to Germany for this breach, and was taking extensive measures seeking to avoid any recurrence. It noted also the speculative nature of Germany's claims concerning the impact of consular assistance in this case. As to the specific relief requested, among other things, the United States challenged the binding nature of the Provisional Measures order, particularly in this case when the order indicated what the United States "should" do, and argued that it had in any event taken all appropriate measures to comply with it. (*See also Digest 2000*, Chapter 2.A.2.)

In its decision of June 27, 2001, excerpted below, the ICJ found in favor of Germany as to its submissions with the exception of its assertion of an obligation to provide Germany assurances of non-repetition. This decision is the first in which the ICJ has held that an indication of provisional measures is legally binding.

All oral and written pleadings as well as the decision in *LaGrand* are available at [www.icj-cij.org](http://www.icj-cij.org).

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THE COURT,

\* \* \* \*

**(3) By fourteen votes to one,**

*Finds* that, by not informing Karl and Walter LaGrand without delay following their arrest of their rights under Article 36, paragraph 1 (*b*), of the Convention, and by thereby depriving the

Federal Republic of Germany of the possibility, in a timely fashion, to render the assistance provided for by the Convention to the individuals concerned, the United States of America breached its obligations to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 1;

\* \* \* \*

**(4) By fourteen votes to one,**

*Finds* that, by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers after the violations referred to in paragraph (3) above had been established, the United States of America breached its obligation to the Federal Republic of Germany and to the LaGrand brothers under Article 36, paragraph 2, of the Convention;

\* \* \* \*

**(5) By thirteen votes to two,**

*Finds* that, by failing to take all measures at its disposal to ensure that Walter LaGrand was not executed pending the final decision of the International Court of Justice in the case, the United States of America breached the obligation incumbent upon it under the Order indicating provisional measures issued by the Court on 3 March 1999;

\* \* \* \*

**(6) Unanimously,**

*Takes note* of the commitment undertaken by the United States of America to ensure implementation of the specific measures adopted in performance of its obligations under Article 36, paragraph 1 (b), of the Convention; and *finds* that this commitment must be regarded as meeting the Federal Republic of Germany's request for a general assurance of non-repetition;

**(7) By fourteen votes to one,**

*Finds* that should nationals of the Federal Republic of Germany nonetheless be sentenced to severe penalties, without their rights

under Article 36, paragraph 1 (*b*), of the Convention having been respected, the United States of America, by means of its own choosing, shall allow the review and reconsideration of the conviction and sentence by taking account of the violation of the rights set forth in that Convention.

\* \* \* \*

## **2. Consular Notification and U.S. Criminal Prosecution**

### ***a. Department of State communications with Governor of Oklahoma***

On June 5, 2001 William H. Taft, IV, Legal Adviser of the Department of State, on behalf of the Department of State, wrote to the Oklahoma Pardon and Parole Board concerning its consideration of a petition for clemency on behalf of Gerardo Valdez, a Mexican national convicted of murder and sentenced to death. *Valdez v. Oklahoma*, Case No. PCD-2001-1011. The letter brought to the Board's attention the fact that Mr. Valdez had not been notified of his right to have a Mexican consular official informed of his detention, in violation of the Vienna Convention on Consular Relations. Mr. Taft also indicated that the Department of State would apologize to the Government of Mexico and requested that the Board give careful consideration to the pending clemency request. On June 13, 2001, following a recommendation by the Board that the Governor grant Mr. Valdez's request for clemency, the Legal Adviser sent a similar letter to the Governor of Oklahoma. On July 11, 2001, the Legal Adviser again wrote to the Governor drawing his attention to the June 27, 2001 decision by the International Court of Justice in the *LaGrand* case, *supra*, and specifically requesting him to consider whether the VCCR violation had had any prejudicial effect on Mr. Valdez's conviction or sentence. Excerpts from the two letters to the Governor are set forth below.

The full texts of the letters are provided at [www.state.gov/s/l](http://www.state.gov/s/l).



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**Letter of June 13, 2001**

I understand that you are currently considering a recommendation by the Oklahoma Pardon and Parole Board that Gerardo VALDEZ, a Mexican national scheduled for execution on Tuesday, June 19, 2001, be granted clemency. On behalf of the Department of State, I wrote to the Pardon and Parole Board last week concerning Mr. Valdez's petition, and would like to bring the same issue to your attention.

The Government of Mexico has contacted the Department about this case because of its concern that Mr. Valdez was not advised at the time of his arrest of his right to have a Mexican consular official notified of his detention. Under Article 36(1)(b) of the Vienna Convention on Consular Relations, a treaty to which the United States and Mexico are parties, a foreign national who is arrested or detained must be so notified "without delay." The Department of State places highest importance on our consular notification obligation, the reciprocal observance of which serves to protect all Americans who travel or live abroad.

We have been in touch with the Office of the Attorney General for the State of Oklahoma about this case. We understand that, notwithstanding the fact that he was a Mexican citizen, Mr. Valdez was not advised of his right to request consular assistance from Mexican consular officials at any time prior to his trial or during his subsequent incarceration. The Government of Mexico became aware of Mr. Valdez's detention on April 19, 2001, when family members of Mr. Valdez first contacted the Mexican Consulate in El Paso.

According to the Attorney General's office, arresting and detaining officials learned that Mr. Valdez was a Mexican citizen within a day of his arrest in July 1989. This information indicates that there was a failure to comply with the provisions of the Vienna Convention on Consular Relations, as Mr. Valdez was not advised of his right to have a Mexican consular official notified of his detention. If Mr. Valdez had been so advised and if he had requested that Mexican consular officials be notified, it would have been incumbent upon Oklahoma authorities to notify the nearest consulate of the fact of Mr. Valdez's detention, so that the

consulate could have provided whatever consular assistance it deemed appropriate.

In view of the above facts, the Department of State will convey to the Government of Mexico on behalf of the United States the Department's deepest regrets over the failure of consular notification in this case. In addition, we ask that you give careful consideration to the pending clemency request for Mr. Valdez, including the failure by authorities to provide Mr. Valdez with consular notification pursuant to Article 36 of the Vienna Convention, and particularly to the representations made by the Government of Mexico on Mr. Valdez's behalf.

\* \* \* \*

#### Letter of July 11, 2001

\* \* \* \*

Since our last communication on this matter, the International Court of Justice has issued a decision in *Germany v. United States (LaGrand)*, a case in which the Federal Republic of Germany contended that the United States and the State of Arizona violated Article 36 in connection with the arrest, trial and execution of two German nationals. We understand that you also have received a copy of the decision, in which the Court stated its view that Article 36(2) of the VCCR was violated "by not permitting the review and reconsideration, in the light of the rights set forth in the Convention, of the convictions and sentences of the LaGrand brothers. . . ." In conjunction with the Department of Justice, we are continuing to study the Court's decision and its potential implications.

Pending completion of that review, I respectfully request that, as part of your consideration of the Valdez case, you specifically consider whether the VCCR violation had any prejudicial effect on either Mr. Valdez's conviction or his sentence. In assessing whether the violation had a prejudicial effect, you may wish to consider the extent to which the violation may have had a substantial adverse effect on the quality of Mr. Valdez's legal representation at the guilt or sentencing phases, and if so, whether any resulting deficiencies in counsel's performance, when considered in light of the trial record or other available information, sub-

stantially undermine your confidence in the correctness of the conviction or sentence. In rendering your decision on Mr. Valdez's clemency petition, you might consider preparing a written statement setting out your consideration of these points.

I very much appreciate the careful attention you have given to this important issue.

***b. Governor's communication with the Government of Mexico***

In a letter to the President of Mexico dated July 20, 2001, Governor Frank Keating described his decision to deny clemency to Mr. Valdez, including his review and consideration of the failure to advise Mr. Valdez of his right to consular notification. The letter is provided below. At the end of 2001, a second petition for post-conviction relief filed by Mr. Valdez citing, *inter alia*, the *La Grand* decision, was pending before the Court of Criminal Appeals for the State of Oklahoma.

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I am writing you concerning the disposition of the case of Gerardo Valdez. As I agreed in our telephone conversation last month, I have thoroughly reviewed the facts and the law in this case. I am satisfied that an appropriate review and reconsideration of the conviction and sentence of Mr. Valdez have occurred.

As you know, in March 1990, Mr. Valdez was tried in the District Court of Grady county, Oklahoma for the murder of Juan Barron. As I will describe in more detail below, Mr. Valdez was afforded all rights under the United States Constitution and the Oklahoma Criminal Code. In particular, Mr. Valdez was provided an attorney who was fluent in Spanish and experienced in murder cases and criminal defense in general.

It is important to note that at no time in the trial nor in any subsequent proceedings has Mr. Valdez ever contended that he did not murder Juan Barron. In fact, Mr. Valdez admitted to this brutal killing. Nor were the facts of the crime in question. Mr. Valdez drove his victim to Mr. Valdez's home where he subjected Mr. Barron to various threats before shooting him twice, slitting his throat and burning his body. Also, it was not challenged that

all of this was done because Mr. Valdez viewed Mr. Barron's homosexuality with substantial distaste. That this was a heinous hate crime is not disputed.

As there was no doubt that Mr. Valdez perpetrated these atrocities, an insanity defense was raised and presented at the trial. In that regard, the jury and the court had ample opportunity not only to observe Mr. Valdez but to actually hear him testify. Further, during the first stages of the trial, the defense and prosecution both presented expert testimony as to Mr. Valdez's mental condition at the time of the crime. While additional testimony regarding Mr. Valdez's mental condition was not provided in the second stage, the jury was advised by the judge to consider all the evidence previously presented in the first stage. After deliberation, the jury convicted Mr. Valdez of First Degree Murder. He was sentenced to die for this crime.

In the intervening years, Mr. Valdez has exercised numerous avenues of appeal within our state court system and habeas corpus proceedings in federal courts. As a result of these actions, there are written opinions from the Oklahoma Court of Criminal Appeals, the United States District Court for the Western District of Oklahoma and the United States Tenth Circuit Court of Appeals. While petition for certiorari was made, certiorari was denied by the United States Supreme Court. There have been no allegations that Mr. Valdez was not afforded the full access to every avenue of review or other judicial process in exactly the same manner as a citizen of the United States would have been.

In his appeals, Mr. Valdez raised various allegations of error including, in particular, competency and ineffective assistance of counsel. The courts have consistently affirmed or otherwise refused to disturb the conviction and sentence of Mr. Valdez. After exhausting all of his appeals, Mr. Valdez presented his case to the Oklahoma Pardon and Parole Board on June 6, 2001. The Board made a recommendation to me that clemency be granted to Mr. Valdez by commuting his death sentence to life without parole.

As promised during our telephone conversation, I granted a thirty day stay of execution to allow for appropriate review and reconsideration of the conviction and sentence in this case. In the interim, the International Court of Justice handed down its decision in the *LaGrand* case (Germany v. United States of America).

You should know that my staff and I have consulted throughout this process with the United States Department of State and the United States Department of Justice about the legal aspects of the consular notification issue. Taking the decision in *LaGrand* into account, I have conducted this review and reconsideration of Mr. Valdez's conviction and sentence by taking account of the admitted violation of Article 36 of the Vienna Convention regarding consular notification, as well as the information provided by, among others, representatives of your government.

In so doing, my legal staff, advisors and I have considered the arguments and evidence presented in this case with a particular view toward determining the effect of the Article 36 violation. I have personally met with Mr. Valdez's defense attorneys, Bob Nance and Andy Fugitt, and Mexican government officials and attorneys, including Ambassador Juan M. Gómez Robledo, Legal Advisor to the Mexican Ministry of Foreign Affairs, Mr. Rodolfo Quilantan, Legal Advisor to the Embassy of Mexico, Mr. Julian Adem, Consul General of Mexico in Dallas, and Ms. Sandra L. Babcock, Legal Advisor on Death Penalty Issues to Mexico. I have also met with Oklahoma Attorney General Drew Edmondson, Assistant Attorney General Robert Whittaker, and District Attorney Gene Christian. In addition to making personal arguments to me and my legal staff and advisors, each of these interested parties has been given the opportunity to submit information and documentation, all of which has been reviewed. Our actions have also included a review of all of Mr. Valdez's appellate decisions, trial and case materials, information provided throughout these various meetings, the Pardon and Parole Board packets from both sides, and relevant cases provided to us or that had been researched by my legal staff.

After thorough and thoughtful review and consideration, I have determined that clemency should not be granted in this case.

While it is true that Mr. Valdez was not notified of his right to contact the Mexican Consulate in clear violation of Article 36 of the Vienna Convention on Consular Relations, that violation, while regretful and inexcusable, does not, in and of itself, establish clearly discernible prejudice or that a different conclusion would have been reached at trial or on appeal of Mr. Valdez's conviction or sentence. I must, therefore, look to the specific materi-

als and arguments to judge whether justice was done in this case.

It is important to remember that all Constitutionally mandated rights of Mr. Valdez were scrupulously protected. It is uncontested that he received all the rights which would have been afforded one of our own citizens. On appeal, our courts consistently rejected allegations of failures in the process. Therefore, I do not believe that granting clemency is an appropriate remedy in this case. The thoughtful decision of a jury and our courts must be respected unless clear error or real doubt exists. I do not believe either to be the case here.

Much was made of the issue of the quality and adequacy of Mr. Valdez's legal representation. This issue was raised in all appellate actions and has withstood the scrutiny of judicial review. I do not find sufficient and compelling justification to depart from those determinations. I would reiterate that the court appointed trial counsel was experienced in criminal defense and was fluent in Spanish. I note that, in our system, every person is entitled to competent counsel. It has been held in numerous court decisions that that right does not, however, mean a perfect defense or one which, with hindsight, might have been handled differently.

Lastly, the post-trial affidavits of additional experts to the effect that organic brain dysfunction could "possibly" explain the crime or support the contention that Mr. Valdez "quite possibly" did not know right from wrong at the time of the crime remain too speculative to be persuasive. I note that Mr. Valdez did present an expert witness at trial to testify to his mental condition at the time of the crime. The jury concluded that Valdez did know right from wrong at the time of the commission of the offense.

Throughout the various proceedings to date, Mr. Valdez has been afforded all of the same rights that would be afforded to any United States citizen. Moreover, for reasons explained above, there is no substantial basis for concluding that the violation of the Vienna Convention had any prejudicial effect in the determination of Mr. Valdez's guilt or sentence. To afford clemency to him on the basis of harmless errors would presume greater rights for foreign nationals that, in my judgment, are not warranted.

In conclusion, I find that the failure to comply with Article 36 did not have prejudicial effect on either the final determination of guilt or the sentence imposed in this case. No compelling

reason exists to undermine the confidence and integrity of the jury and the courts in this case. Therefore, I have this day issued an Executive Order denying clemency to Mr. Valdez.

I hope that this letter adequately assures you that I have taken this matter very seriously and have, after much debate and thought, reached the conclusion that justice has been done in this case.

### **3. Consular Notification and Access for American Nationals Abroad**

On June 18, 2001, the Department of State sent a telegram to all U.S. diplomatic and consular posts abroad reviewing rights and obligations under the Vienna Convention on Consular Relations as it relates to American nationals abroad. The telegram provides guidance relating to when and how U.S. consular posts should react when they are not promptly notified of the arrest and detention of an American citizen, including a dual national. Excerpts from the telegram are set forth below.

The full text of the telegram is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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\* \* \* \*

### **What Is Consular Notification?**

3. Rooted in customary international law and practice, consular notification was codified over the last half century in the Vienna Convention on Consular Relations of 1963 (VCCR) and various bilateral consular agreements. Because of its near universal applicability, article 36(1)(b) of the VCCR established the baseline for consular notification. This article provides that in arrests and detentions, detained foreign nationals must be informed “without delay” of their right to have their consular officials notified of their arrest or detention, and that, if the foreign national so requests, consular officials of the home country must be notified of the arrest or detention “without delay.”

4. The Department has interpreted the term “without delay”

in the VCCR as meaning, generally, that there should be no deliberate delay, and notification should occur as soon as reasonably possible under the circumstances. The Department believes that notification within 24 hours would, *prima facie*, be considered to be “without delay” and that notification within 72 hours would, in most circumstances, be considered to be “without delay.” The Department similarly considers notification within 24–72 hours to be timely under bilateral consular treaties unless the language of the bilateral agreement specifies a different time frame.

5. Under the VCCR, the form of notification is not specified and may take any form reasonably calculated to relay the relevant information to the consular officer so that the officer may take necessary steps to provide consular protective services, including requesting and gaining consular access. Thus, notification may be in writing (by diplomatic note, letter, or any other writing) or orally (in person or, for example, a message left on an answering machine). Faxing or e-mailing the notification to the consular officer can greatly expedite receipt of notification and should be encouraged. The Department believes that to be useful, the notification should, at a minimum, provide the name and place of detention of the foreign national, and instructions for obtaining additional information should the consular officer wish to do so. . . .

### **And if Delay in Notification is Unreasonable?**

6. Action requested: Drawing on the guidance in paras 3–5 above and 7 FAM 411, 412, and 415, posts should assess whether an impermissible delay in notification has occurred whenever post becomes aware that an American citizen has been detained. If a delay has occurred, post must report that delay. . . .

7. In VCCR cases where notification has not been timely (not made within 72 hours), and post has not been able to confirm that the detainee did not ask for notification after being informed of the right to it, posts should promptly protest the notification violation in accordance with 7 FAM 415.4-1. . . . Note that, while the VCCR provides that consular notification is at the option of the detainee, 56 countries are governed by bilateral consular conventions under which consular notification is mandatory whether



or not the detainee/arrestee wishes the consular officer to be informed. Posts should be familiar with the treaty provisions applicable to the host country. In the event of long notification delays, particularly in cases of serious crimes or where the U.S. citizen could face severe penalties, the protest should include a request for an investigation of the notification violation and a report from the investigating authority promptly. . . .

\* \* \* \*

9. Per 7 FAM 415.4-1, protesting unreasonable delays in consular notification is not discretionary but has long been an integral element of U.S. policy to provide protective consular services to detained Americans overseas. . . .

## **Dual Nationals**

### **10. Arrest in the Country of the Other Nationality:**

Generally speaking, consular notification is not/not required by treaty if the U.S. citizen detainee is also a citizen of the country where the arrest occurred. This is true even if the detainee's other country of citizenship is a mandatory notification country. It is a generally recognized rule of international law that when a person who is a dual national is residing or traveling in either of the countries of nationality, the person owes paramount allegiance to that country. The country of residence generally has the right to assert its claim without interference from the other country of nationality. Thus, in the absence of agreements to the contrary between the United States and other nations, if a dual national encounters difficulties in the country of the second nationality, the U.S. government's representations on that person's behalf may or may not be accepted. Nevertheless, it is the Department's policy to intervene on behalf of all Americans, and make representations on their behalf, regardless of dual national status. . . .

### **11. Naturalized U.S. Citizens and Dual Nationals Descended From Naturalized U.S. Citizens:**

This situation can be particularly sensitive with regard to the arrest of U.S. citizens who were not aware they were also nationals of another country, or who are unable to relinquish their other nationality. This includes naturalized U.S. citizens who were

unable to divest themselves of the nationality of their country of birth due to either the lack of procedures to permit relinquishment of the other nationality, or the fact that such procedures are extremely difficult to satisfy, are protracted and/or expensive. Such an individual may consider and conduct himself/herself exclusively as a U.S. citizen, but find that the country of origin still regards him/her as a national of that country. In addition, some countries regard allegiance to the subject's ancestral country of origin to extend to the next generation. . . .

12. Special Consular Agreements Regarding Consular Notification and Access to Dual Nationals:

The United States has consular agreements or arrangements with China, Poland, Vietnam, and North Korea that address questions of dual nationals and similar assistance. These agreements provide that "all nationals of the sending state entering the receiving state on the basis of travel documents of the sending state containing properly executed entry and exit visas of the receiving state will, during the period for which their status has been accorded, and in accordance with the visa's period of validity, be considered nationals of the sending state by the appropriate authorities of the receiving state for the purpose of ensuring consular access and protection by the sending state." This does not necessarily imply that the two governments recognize dual nationality. Note that the U.S. requires its citizens to enter/leave the U.S. on U.S. passports, a requirement that effectively bars question of these problems in the United States.

13. Rights and Responsibilities of the U.S. Regarding Dual National Arrests:

When dealing with dual nationals, it is helpful to distinguish between (1) the right of the U.S.G., through a U.S. consul, to provide consular services to the dual national and (2) the right of the dual national, as a U.S. citizen, to receive consular services from the U.S.G. without regard to his or her other nationality. It is important, per 7 FAM 413.1e, that a dual national traveling in a third country on a U.S. passport must clearly be regarded by the host country as a U.S. citizen to ensure that he/she is permitted to receive the full range of consular services provided to any American. On the other hand, a dual national traveling abroad on a passport of that person's other country of nationality may find

that the host country treats him/her only as a national of the country whose passport he/she carries, and does not recognize the United States as a country entitled to provide consular services. This does not, however, change the fact that the U.S.G. must treat the U.S. citizen like any other U.S. citizen, and should seek to do so to the fullest extent permitted by the host country. In such a situation, the U.S. consul should pursue all appropriate consular responsibilities. If the second country of nationality is providing protective services to a dual national, U.S. consular officers should consult with the prisoner and their foreign consular colleagues to ensure appropriate protection is provided to the arrestee. . . .

### **Consular Access**

14. Article 36(1)(c) of the VCCR sets forth the requirement that the host government allow consular officers access to detained nationals to converse with them, arrange for their legal representation and to take other actions to provide for their welfare, consistent with local law. Article 36(1)(a) provides that consular officers and their nationals shall be free to communicate and have access to each other. Similar to the requirement of timely notification, these provisions and similar language in bilateral treaties require host governments to provide consular officers timely access to detained U.S. citizens. It is U.S. policy that prompt personal access is necessary. This demonstrates to both the detained citizen and the host government the serious interest of the U.S. government in the case and in the welfare of our citizens, and allows first-hand confirmation of the citizen's wishes and needs. Even in the case where a U.S. citizen informs the host government he/she does not want consular assistance, the consular officer should visit the U.S. citizen personally to verify his/her U.S. citizenship, to reassure the citizen of our interest in providing him/her assistance, and to verify directly that no assistance is desired. Only in this manner can a consular officer be satisfied that the citizen's rights within the host country are being protected. See 7 FAM 415.

### **Special Notification Cases—Deaths, Minors, Persons Lacking Full Capacity, Aviation/Vessel Accident**

17. Posts should also be aware that Article 37 of the VCCR requires notification by host country officials in instances of the death of a foreign national; appointment of guardian or trustee of a minor or other person lacking full capacity who is a foreign national; and if a vessel or aircraft registered in a foreign country suffers an accident. With respect to notification of the death of a U.S. citizen arrested or detained abroad or the appointment of a guardian or trustee for a U.S. citizen arrestee found to lack full capacity, posts should follow similar procedures to monitor compliance with these provisions, protest failure to comply, and notify the Department.

\* \* \* \*

#### **4. Consular Assistance to American Prisoners Abroad**

On April 14, 2001, the Department provided guidance to American consulates and embassies abroad on responding to allegations of mistreatment by Americans incarcerated in foreign countries. As noted in the telegram, “one of the most essential tasks of the Department of State and of posts abroad is to ensure fair and humane treatment for American citizens imprisoned overseas.” Excerpts from the telegram transmitting this guidance are provided below.

The full text of the telegram is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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\* \* \* \*

#### **What Is Mistreatment?**

3. In determining whether a prisoner’s complaint qualifies as mistreatment, posts’ first benchmark is the host country’s own standards. Upon arrival at post, consular officers should famil-

iarize themselves with host country judicial procedures, and be prepared to outline them to an arrestee. Such information would include, but is not limited to, the maximum period of pre-trial confinement, the right to legal representation, and the prisoner's right to avoid self-incrimination. Violation of the host country's own legal standards is by definition mistreatment. Post should also be sensitive to an arrestee's allegation of physical abuse by police or prison officials, which would constitute "mistreatment" within the meaning of this guidance.

4. Local legal standards, however, are not the only guidelines in determining mistreatment. In many countries, the standards of the judicial process and the prison system are low enough that they do not meet minimum international norms concerning the rights of the arrested and imprisoned. International norms concerning the rights of prisoners are outlined in a number of U.N. documents, most notably the UNHCR's "Standard Minimum Rules for the Treatment of Prisoners," and the "Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment." . . . Posts should note that some of these documents are non-binding resolutions; in such cases, it is not appropriate to speak of their being "violated." Further, while more than 100 states are party to and therefor legally bound by the Convention Against Torture, including the U.S., a number of countries are not parties to this treaty. Posts should take these factors into account when considering how to best formulate interventions based on international norms. . . . Intentional infliction of severe pain or suffering, excessively lengthy pre-trial detention, unreasonable confiscations of a prisoner's personal property, inhumane prison conditions, and a prison diet insufficient to maintain a minimally acceptable standard of health would not meet international norms and, with the consent of affected American prisoners, would require a post protest.

5. In addition to noting local and international standards, post should be on the lookout for situations in which American prisoners are discriminated against because of their American citizenship. Such instances may occur in nations with poor relations with the United States, but could occur anywhere. In assessing whether there is mistreatment in these cases, the Department notes that nationals of a country often enjoy rights normally not

accorded to foreigners; for example, the right to participate in that nation's political process. Such instances would not per se qualify as mistreatment; rather post's emphasis should be in identifying mistreatment in the judicial process and the conditions of the prisoner's incarceration. . . .

### **Determining the Credibility of the Allegation of Mistreatment**

6 . . . [I]t is imperative that as soon as learning of an American prisoner's allegation of mistreatment, a consular officer make every effort to determine the veracity of these allegations. In doing so, the consular officer may rely on his/her own visual examination of the prisoner, a doctor's examination (if available), the oral or written testimony of the prisoner, the track record of law enforcement officials in the host country and any other factors the officer deems relevant. The benefit of doubt in such determinations should normally go to the American; that is, in instances where the prisoner claims abuse, and the consular officer is unable to make a determination, he should ask the prisoner if he wishes the consular officer to protest his mistreatment, or at least to request that the host government respond to the allegations.

### **Obtaining Prisoner's Permission to Lodge A Protest**

7. Normally, the decision to request a protest of a credible allegation of mistreatment is the prisoner's. Many prisoners with credible allegations of mistreatment will not want to make a protest, fearing potential reprisals from host country officials. . . .

\* \* \* \*

## **5. Consular Assistance to Victims of Crimes**

In June 2000, the Office of Overseas Citizens Services of the Bureau of Consular Affairs, Department of State, initiated a program to promote greater consistency in response by American embassy personnel to American victims of all serious crimes abroad, and to enhance the assistance provided. Serious crimes include homicide, rape, kidnapping, terror-

ism, assault, robbery, trafficking, child physical and sexual abuse, domestic violence, and other crimes in which victims suffer serious physical injuries and/or emotional trauma. During 2001, a series of telegrams was sent to all American posts abroad, providing guidance on support for victims and information on available resources, in particular through the Office for Victims of Crime in the Department of Justice. The guidance also urged posts to provide crime victims with information about the host country criminal justice process and points of contact for information about the investigation and prosecution of the case.

A telegram dated May 1, 2001, reviewed the availability of victim assistance programs, which can reimburse crime victims for certain expenses not covered by insurance as well as provide other support services. After noting that victim assistance programs established in the United States are usually available to local residents who have been victims of crime while traveling abroad, the telegram went on to note the existence of foreign programs and relevant international instruments, as set forth in the excerpt below.

The full texts of the telegrams on this topic are available at [\*www.state.gov/s/\*](http://www.state.gov/s/).

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Many other countries have enacted victims' rights laws and developed specialized victim assistance services and compensation programs. Based on information gathered by posts in 1998, 27 countries operate crime victim compensation programs that may cover foreign nationals (including U.S. citizens) who are victims of violent crime in the country. . . .

There is also a variety of international instruments related to the plight of victims of crime. Most are in the form of non-binding declarations that articulate the rights of crime victims and the types of assistance that should be provided. Focusing host government attention on the principles of these instruments, where applicable, may be useful. The most extensive of these instruments is the U.N. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (VAP), adopted by General Assembly Resolution 40/34 of 29 November 1985, and approved by unanimous vote of all member nations. A key principle of the

VCAP U.N. Declaration is that victims should be treated with compassion and respect and granted access to justice for the harm suffered. (See [www.unhcr.ch/html/menu3/B/H\\_COMP49.html](http://www.unhcr.ch/html/menu3/B/H_COMP49.html).)

\* \* \* \*

The Department of Justice Office for Victims of Crime has extensive information on crime victim assistance and compensation programs offered in each state, an international directory of crime victims compensation programs, and links to additional specialized organizations and information on its internet website: [www.ojp.usdoj.gov/ovc](http://www.ojp.usdoj.gov/ovc).

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## **B. CHILDREN**

### **1. Hague Convention on International Child Abduction**

#### ***a. Recognition of foreign court determinations***

In response to an inquiry by the U.S. Court of Appeals for the Second Circuit, the United States filed a letter brief on January 5, 2001, setting forth the views of the Department of State as to the appropriate disposition of an appeal from the decision in *Diorinou v. Mezitis*, 132 F. Supp. 2d 139 (S.D.N.Y. 2000). In proceedings conducted pursuant to the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601–11610, implementing the Hague Convention in the United States, the lower court had determined that Greece was the habitual residence of two dual national U.S.-Greek siblings. In doing so, the district court relied on decisions by Greek courts in prior Hague Convention litigation holding that the Greek mother had not wrongfully retained the children in Greece in 1995. Based on these earlier Greek decisions, the district court concluded that the mother was properly exercising custody rights in Greece and that the children's removal from Greece by their U.S. father in 2000 was wrongful. On appeal, the central issue was whether the lower court properly gave dispositive weight to the earlier Greek court decisions that the children were not wrongfully retained in Greece.



In excerpts from the letter brief set forth below, the State Department disagreed with the portion of the district court's holding that the district court was bound by the Greek court's prior rulings under the full faith and credit provisions of ICARA, 42 U.S.C. § 11603(g). The Department supported the district court's decision on the facts of this case, however, on the basis of international comity. The Second Circuit affirmed the lower court's decision on January 9, 2001. *Diorinou v. Mezitis*, 237 F.3d 133 (2nd Cir. 2001).

The full text of the letter brief is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## DISCUSSION

### 1. Section 11603(g)'s "Full Faith and Credit" Provision Is Inapplicable

Following prior interpretations of 42 U.S.C. § 11603(g), *see, e.g., Morton v. Morton*, 982 F. Supp. 675, 685 (D. Neb. 1997); *In re Matter of David S.*, 574 N.Y.S.2d 429, 431 (Family Ct. Kings Co. 1991), the district court held that "[f]ull faith and credit is given to prior adjudications of Hague Petitions by foreign states, provided that the decisions were not jurisdictionally deficient under the Convention," *Diorinou*, 2000 WL 1793177, at \*5. This reading of the ICARA is incorrect.

Section 11603(g) provides that

[f]ull faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this chapter.

42 U.S.C. § 11603(g). The ICARA defines "State" to mean "any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States." *Id.* § 11602(8). The phrase "any other such court" obviously means

“the courts of the States and the courts of the United States.” *Id.* § 11603(g). Accordingly, the ICARA’s full faith and credit provision expressly governs the treatment of judgments by and between American courts (*i.e.*, state and federal courts); it does not address the weight that American courts should afford foreign judgments under the Hague Convention.

The legislative history makes this point clear. The House Judiciary Committee’s report on the ICARA explains that

full faith and credit shall be accorded throughout the United States to judgments and orders of courts *in the United States* rendered with regard to return actions pursuant to the Convention and the Act. This means, for example, that if a court in one jurisdiction has ordered the return of a child and the child is located in another jurisdiction *in the United States* before that order has been executed, the order shall be given full effect in the second jurisdiction without the need to initiate a new return action there pursuant to the Convention and the Act. It also means that if the return request is denied, the court’s decision shall be recognized by courts in other jurisdictions.

H.R. Rep. No. 525, 100th Cong., 2d Sess. 12 (1988), *reprinted in* 1988 U.S.C.C.A.N. 386, 393–94 (emphasis added).

It was therefore error for the district court to hold that it was bound under § 11603(g) by the Greek court’s prior ruling on Mezitis’s Hague Convention petition. *See Diorinou*, 2000 WL 1793177, at \*1. Nothing in the ICARA or the Hague Convention requires American courts to adopt blindly the decisions of foreign tribunals. To the contrary, Article 20 of the Hague Convention provides that the “return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.” For example, it is conceivable that a foreign proceeding might be so stilted and unfair that enforcement of any resulting order or judgment would violate fundamental precepts of American jus-

tice. As a result, American courts are free to withhold from foreign judgments the “full faith and credit” that is contemplated by § 11603(g).

## 2. The District Court’s Order Should Be Affirmed on International Comity Grounds

Unlike § 11603(g)’s unqualified directive, the doctrine of international comity accommodates reasonable concerns regarding the fairness of foreign proceedings. This doctrine also accommodates our strong national interest in fostering cooperation and reciprocity during resolution of international child abduction cases, *see* 42 U.S.C. § 11601, while still permitting public policy to bar recognition of any foreign judgment that significantly misapplies the Hague Convention. The district court therefore correctly invoked the doctrine as an alternative basis for its decision. *See Diorinou*, 2000 WL 1793177, at \*5.\*

Federal law instructs that “the recognition of foreign judgments and proceedings is governed by principles of comity.” *Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 (2d Cir. 1987). This doctrine embodies the

“recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.”

*Finanz AG Zurich v. Banco Economico, S.A.*, 192 F.3d 240, 246 (2d Cir. 1999) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164 (1895)). Its principles are well-established, and courts “have advocated them in order to promote cooperation and reciprocity with

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\* The district court invoked the doctrine of *res judicata* as another basis for its decision. *See Diorinou*, 2000 WL 1793177, at \*5. As applied to judgments of foreign nations, however, *res judicata* is better understood as a specific application of comity. *See Alesayi Beverage Corp. v. Canada Dry Corp.*, 947 F. Supp. 658, 663 (S.D.N.Y. 1996) (courts “may choose to give *res judicata* effect to foreign judgments on the basis of comity”), *aff’d*, 122 F.3d 1055 (2d Cir. 1997).

foreign lands.” *Pravin Banker Assocs., Ltd. v. Banco Popular de Peru*, 109 F.3d 850, 854 (2d Cir. 1997). The doctrine of comity “is best understood as a guide where the issues to be resolved are entangled in international relations,” *Jota v. Texaco, Inc.*, 157 F.3d 153, 160 (2d Cir. 1998) (citation omitted), and thus “remains a rule of practice, convenience, and expediency rather than of law,” *Pravin Banker Assocs.*, 109 F.3d at 854 (citation omitted).

Under principles of comity, “United States courts ordinarily refuse to review acts of foreign governments and defer to proceedings taking place in foreign countries, allowing those acts and proceedings to have extraterritorial effect in the United States.” *Jota*, 157 F.3d at 159–60 (citation omitted). Significantly, “courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States.” *Pravin Banker Assocs.*, 109 F.3d at 854. Absent such adverse implications, however, the doctrine instructs that,

where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not . . . be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.

*Hilton*, 159 U.S. at 202–03.\*

Here, principles of international comity support giving the Greek judgment preclusive effect in the district court ICARA proceeding. As a threshold matter, the Greek courts’ determi-

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\* These criteria have endured. Section 481 of the Restatement of Foreign Relations Law provides that, “[e]xcept as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum

nation that Diorinou did not wrongfully retain her children in Greece embodies a reasonable construction of the Hague Convention. Among other things, the Greek courts determined that, in 1995, Mezitis “had acquiesced to the retention of the children by [Diorinou] not only tacitly with his conduct but also explicitly.” *Diorinou*, 2000 WL 1793177, at \*4 (quoting intermediate Greek appellate court). Based in part on this finding, the Greek courts rejected Mezitis’ petition for their return to New York.\*

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of money, *establishing or confirming the status of a person*, or determining interests in property, is conclusive between the parties, and is entitled to recognition in the courts of the United States.” Restatement (Third) of Foreign Relations Law § 481(1) (1986) (emphasis added). In turn, § 482 of the Restatement provides that an American court “may not recognize” a foreign judgment if it “was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law,” or the foreign court “did not have jurisdiction over the defendant.” *Id.* § 482(1). Section 482 additionally provides that an American court “need not recognize” a foreign judgment if the foreign court lacked subject matter jurisdiction over the action, the defendant did not have sufficient notice of the foreign proceedings to mount an adequate defense, the foreign judgment was obtained by fraud, the underlying claim is “repugnant to the public policy of the United States,” the foreign judgment conflicts with another final judgment entitled to recognition, or the foreign proceedings violated a forum selection agreement. *Id.* § 482(2). Although the State Department does not accept the Restatement as an accurate statement of law in all respects, it does agree with this formulation of the comity doctrine.

\* In addition, the Greek courts stated that returning the children to Mezitis would be inappropriate under Article 13(b) of the Hague Convention, which permits a court to decline to return children to their habitual residence if doing so would expose them to grave risk of psychological harm or place them in an intolerable position. The Greek courts also stated that Mezitis was not exercising custody rights at the time he left the children in Greece in 1995; under Article 3 of the Hague Convention, such retention is wrongful when in violation of exercised custody rights. The limited record available raises a serious question whether the Greek courts addressed the facts relevant to these issues in a manner consistent with the United States’ understanding of Articles 3 and 13. If a flawed analysis were essential to a foreign court’s ruling under the Hague Convention in a particular case, *e.g.*, if the court applied a clearly erroneous interpretation of Article 13, a comity analysis might appropriately lead an American court to decline to accept the foreign decision. In this case, however, the Greek courts’ findings with regard to Articles 3 and 13 do not appear essential to its judgment.

The Greek courts' conclusion that such acquiescence by Mezitis precluded a finding of wrongful retention under the Hague Convention is not fundamentally inconsistent with the policy of the United States, and therefore deference in this case to the relevant portions of the Greek judgment would not undermine American interests. Congress specifically found that "[i]nternational abductions and retentions of children are increasing, and only *concerted cooperation pursuant to an international agreement* can effectively combat this problem." 42 U.S.C. § 11601 (a)(3) (emphasis added). Congress additionally found that the Hague Convention "provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions." *Id.* § 11601(a)(4). Indeed, had the district court permitted Mezitis to evade the Greek judgment by relitigating whether his children might lawfully remain in Greece with Diorinou, it would have "frustrate[d] a paramount purpose" of the Hague Convention—"namely, to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court." *Blondin v. DuBois*, 189 F.3d 240, 246 (2d Cir. 1999) (citation omitted).

Conversely, comity would not be appropriate here had the Greek courts' application of the Hague Convention clearly violated either the letter or the spirit of the treaty. *Accord Saroop v. Garcia*, 109 F.3d 165, 170 (3d Cir. 1997) (comity appropriate where there is "no treaty provision or past practice which precludes reliance" on foreign judgment). The reason is plain: If the order of a foreign court "is inherently inconsistent with the policies underlying comity, domestic recognition could tend either to legitimize the aberration or to encourage retaliation." *Laker Airways Ltd. v. Sabena, Belgian Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984). Thus, the "obligation of comity expires when the strong public policies of the forum are vitiated by [a] foreign act." *Pravin Banker Assocs.*, 109 F.3d at 854 (citation omitted).

Comity is also appropriate in this case because recognition of the Greek judgment by the district court would not offend due process. As the district court found, and as the record makes obvi-

ous, Mezitis fully litigated his 1996 Hague Convention petition through the highest court in Greece. *See Diorinou*, 2000 WL 1793177, at \*1. He was represented by Greek counsel. The Greek trial court heard witness testimony and received documentary evidence. Based on the trial record, the Greek courts found that Mezitis intended his children to remain in Greece with their mother. *See id.* at \*4. To our knowledge, Mezitis did not challenge this finding in the district court as fraudulent or institutionally biased. Given the uncontested fairness of the Greek proceedings, comity favors deference to the Greek courts' determination. *See Hilton*, 159 U.S. at 202–03; Restatement (Third) of Foreign Relations Law §§ 481–82 (1986).

### 3. The New York State Custody Orders Should Not Defeat the Application of Comity in this Case

The district court correctly concluded that the orders of the New York court granting Mezitis custody of the children should not undermine the effect of the Greek judgment in this ICARA proceeding. *See Diorinou*, 2000 WL 1793177, at \*5–6. Article 17 of the Hague Convention expressly provides that even enforceable custody orders “shall not be a ground for refusing to return a child under [the] Convention,” but that, “in applying [the] Convention,” a court may take into account “the reasons for that [custody] decision.” The circumstances surrounding the New York court's custody determination in this case significantly diminish its persuasive force.

To start, the New York court first granted temporary custody of the children to Mezitis in July 1997, approximately ten months *after* the Greek trial court denied Mezitis' Hague Convention petition. Furthermore, the district court found that Mezitis did not disclose all material facts to the New York court regarding the status of the Greek judicial proceedings. *See Diorinou*, 2000 WL 1793177, at \*6. Considering these facts, the district court's application of the Hague Convention appropriately discounted the significance of the New York court's custody determination.

**b. *Wider adherence to the Convention***

On June 18, 2001, the Department of State requested a number of American embassies in countries that had not yet become parties to the Hague Convention on International Child Abduction to approach their host governments to encourage them to do so. The Department's suggested language for inclusion in diplomatic notes for this purpose is set forth below.

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\* \* \* \*

The Embassy wishes to take this opportunity to express its concern to the Ministry of Foreign Affairs about the increasing, tragic problem of the abduction of children by parents engaged in custody disputes. This is a problem that affects all countries, and only through the mutual cooperation of all countries can we protect our children.

On July 1, 1988, the United States became party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction. The member states of the Hague Conference on Private International Law, which drafted the Convention, recognizing the harmful effects of parental abduction, concluded that the welfare of the child was of paramount importance in matters relating to their custody. They determined that there should exist an international mechanism for the peaceful and orderly return of children wrongfully removed or retained.

The Convention is now in force in 65 countries. . . . Other countries are taking steps toward becoming parties to the treaty.

The United States strongly recommends implementation of the Hague Convention on Child Abduction to the Ministry of Foreign Affairs and encourages accession. The United States believes that the Convention and similar international agreements represent the best hope for an equitable resolution to the tragic situations of parents and children embroiled in international parental child abduction. The efforts of the international community in this area will serve to protect the futures of all our children.

\* \* \* \*



## 2. Reciprocal Child Support Enforcement Arrangements

Legislation enacted in 1996 as part of that year's welfare reform efforts, gives the Secretary of State, with the concurrence of the Secretary of Health and Human Services, the authority and responsibility to negotiate agreements with foreign countries for the reciprocal enforcement of child support obligations. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 371, 110 Stat. 2105, 42 U.S.C. § 659a. A telegram to American posts in Latin America and the Caribbean, November 28, 2001, concerning efforts to initiate negotiation of such agreements with a number of countries in that region described the effect of such agreements as follows.

The full text of the telegram is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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With such agreements in place a foreign country is treated as if it were a state of the U.S. for purposes of child support enforcement, and all of the procedures and enforcement mechanisms available in interstate cases are available to that foreign country. Essentially, it means that a foreign country's child support order can be readily enforced in the U.S. at no cost to the foreign parent, and all of the collection mechanisms available under U.S. law can be used (e.g., an enormous federal data base to locate absent parents, garnishment of wages, liens on bank accounts, revocation of drivers and other licenses, denial of passports). If there is no foreign order in place, the U.S. state will obtain and enforce a U.S. court order for the foreign applicant. Conversely, the foreign country must be able to enforce U.S. support obligations. . . .

Section 459A of Title IV-D of the Social Security Act (42 U.S.C. 659a) authorizes the Secretary of State to declare any foreign country (or political subdivision thereof) to be a "foreign reciprocating country" if 1) the foreign country has established, or undertakes to establish, procedures for the establishment and enforcement of child support owed to persons residing in the United States by persons residing in the foreign country and 2) those procedures are "substantially in conformity" with the stan-

dards set forth in the statute. . . . The declaration of reciprocity can take the form of an international agreement, or a simple declaration.

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On November 21, 2001, The Office of the Legal Adviser, U.S. Department of State, published a notice in the Federal Register, designating certain countries as reciprocating countries. 66 Fed. Reg. 58544 (Nov. 21, 2001). The following excerpt from the Notice provides further information concerning the procedures established and lists the currently designated foreign reciprocating countries.

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. . . [Procedures established by a reciprocating country] must be in substantial conformity with mandatory elements set out in the statute: procedures for the establishment of paternity and support orders for children and custodial parents; a system for the enforcement of orders, including procedures for the collection and distribution of payments under such orders; providing administrative and legal services without cost to the U.S. applicant; and the designation of an agency to serve as a Central Authority.

Once such a declaration is made, support agencies in jurisdictions of the United States participating in the program established by Title IV-D of the Social Security Act (the IV-D program) [which regulates and provides federal funding for enforcement of child support obligations in the states of the United States] must provide enforcement services under that program to such reciprocating countries as if the request for service came from a U.S. state.

The declaration authorized by the statute may be made “in the form of an international agreement, in connection with an international agreement or corresponding foreign declaration, or on a unilateral basis.” The Secretary of State has authorized either the Legal Adviser or the Assistant Secretary for Consular Affairs to make such a declaration after consultation with the other.

As of this date, the following countries (or Canadian provinces) have been designated foreign reciprocating countries:

Country	Effective date
Australia	May 21, 2001.
Canadian Provinces:	
British Columbia	Dec. 15, 1999.
Manitoba	July 11, 2000.
Nova Scotia	Dec. 18, 1998.
Czech Republic	May 3, 2000.
Ireland	Sept. 10, 1997.
Poland	June 14, 1999.
Portugal	Mar. 17, 2001.
Slovak Republic	Feb. 1, 1998.

\* \* \* \*

The law also permits individual states of the United States to establish or continue existing reciprocating arrangements with foreign countries when there has been no federal declaration. Many states have such arrangements with additional countries not yet the subject of a federal declaration. Information as to these arrangements may be obtained from the individual state IV-D Agency.

### **C. OTHER PRISONER ISSUES**

On June 24, 2001, the Inter-American Convention on Serving Criminal Sentences Abroad entered into force for the United States. Inter-American Convention on Serving Criminal Sentences Abroad, done at Managua, June 9, 1993, entered into force April 12, 1996 ("Convention"). At the end of 2001, eight countries had ratified or acceded to the Convention: Brazil, Canada, Chile, Costa Rica, Mexico, Panama, United States and Venezuela. In addition, Paraguay and Ecuador had signed but not yet ratified.

The Convention, like all prisoner transfer treaties, provides a country's nationals sentenced in foreign courts an alternative to prolonged incarceration abroad. It permits a national of a country that is party to the Convention who is

going to serve or is serving a criminal sentence in a country party to the Convention to request return to the prisoner's country of nationality to serve the sentence under more familiar living and cultural conditions. Transfers may only be made with the consent of the governments of both countries and the prisoner. In 2001, the United States was party to twelve bilateral prisoner transfer treaties as well as the multilateral Council of Europe Convention. Convention on the Transfer of Sentenced Persons, E.T.S. No. 112, available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>. Implementing legislation applicable to bilateral and multilateral prisoner transfer treaties is found at 18 U.S.C. §§ 4100–4115.

The United States ratified the Convention subject to one reservation and one understanding, set forth below. The reservation requires the sentencing state to provide the United States with a translation in English of documents required under the Convention. The United States undertakes to furnish a translation of documents into the language of the requesting state in like circumstances. The understanding relates to Articles III, IV, V, and VI and clarifies that consent requirements in these articles are cumulative. In the case of persons in the U.S. who have been sentenced for violations of state law, consent of both the U.S. Federal and state governments, as well as consent of the prisoner, will be required before a prisoner can be transferred. *See* 146 Cong. Rec. S10658 (Oct. 18, 2000).

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Reservation.—With respect to Article V, paragraph 7, the United States of America will require that whenever one of its nationals is to be returned to the United States, the sentencing state provide the United States with the documents specified in that paragraph in the English language, as well as the language of the sentencing state. The United States undertakes to furnish a translation of those documents into the language of the requesting state in like circumstances.

Understanding.—The United States of America understands that the consent requirements in Articles III, IV, V and VI are cumulative; that is, that each transfer of a sentenced person under

this Convention shall require the concurrence of the sentencing state, the receiving state, and the prisoner, and that in the circumstances specified in Article V, paragraph 3, the approval of the state or province concerned shall also be required.

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Excerpts below from a telegram providing guidance to American embassies and posts in the Western Hemisphere explain the implementation of the Convention.

The full text of the telegram is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## **7. The OAS Process and Prisoner Transfers**

(A) Under the OAS Convention, as in all prisoner transfer treaties, the consent of the U.S. Government, the host government and the prisoner are all required to effect a transfer. Additionally, prisoners from the host country in the United States are subject to the same kind of consent provisions though it should be noted that an alien incarcerated in a U.S. state prison must obtain the consent of the U.S. state, in addition to the consent of the respective governments and the prisoner's own consent, as mentioned above. Whether a prisoner may be transferred or not is a discretionary decision to be made by each country. . . . Forty-five of the fifty states, and the Commonwealth of the Northern Mariana Islands have enacted implementing legislation but only a handful are currently participating.

(B) Under the Convention, a prisoner is considered to be eligible for transfer only when the prisoner's final sentence has been received (i.e. when no ordinary legal appeal is pending and the period for appeal has expired). This is defined in Article I (3) of the OAS Convention. All fines and court costs imposed as part of the prisoner's sentence usually must be paid. Only U.S. nationals may be considered for transfer to the U.S.

(C) Should a prisoner's request for transfer be approved by both governments, and the relevant state government, if necessary, arrangements will be made between the two governments

for the prisoner's transfer to be effected at a time mutually agreeable to the governments.

(D) U.S. law (18 USC 4108) requires that a prisoner who is transferring into or out of the U.S. give consent to the transfer before being transferred. This is done at a Consent Verification Hearing (CVH). For prisoners transferring from foreign countries to the United States this is normally conducted by a United States Magistrate judge in the foreign country prior to the transfer date. . . .

(E) Some countries may be sensitive to the idea of a U.S. Magistrate judge conducting a CVH in the home country. If this poses a problem in the host country, another U.S. official, such as the Consular Officer, may be commissioned to act as the verification officer.

(F) To effect the transfer, prisoners have the right to consult an attorney at their expense. If they cannot afford an attorney, they may request that they be represented by an appointed attorney at U.S. Government expense. . . . The designated appointed attorney would travel to the foreign country and would discuss with each eligible prisoner the consequences of transferring. If the prisoner still wishes to transfer, the prisoner would then appear with the appointed attorney before the verification officer at the CVH and give his/her consent to the transfer.

(G) Special arrangements are made for handling cases involving minors or the mentally ill—see 18 USC sections 4102(8) and (9).

(H) Neither an inquiry nor a request for transfer will bind a prisoner to give final consent. But once final consent is given and verified at the CVH, the consent is irrevocable.

(I) The transferee returns to the United States in the custody of Bureau of Prison officials and will be placed in a Federal prison. This is done at USG expense.

(J) IMPORTANT: A prisoner cannot, repeat cannot, "attack" the foreign conviction in U.S. Courts after transferring under the convention; however, U.S. law does provide that a transferred prisoner will not incur any loss of civil, political or civic rights other than those which under U.S. or state law would result from the fact of the conviction in the foreign country.

(K) Under the Sentencing Reform Act of 1984, prisoner's are entitled to a release determination hearing by the U.S. Parole

Commission after transferring to the United States (18 U.S.C. section 4106A).

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## D. JUDICIAL ASSISTANCE

### 1. Taking of Civil Depositions Abroad

On May 24, 2001, Edward A. Betancourt, Director of the Office of Policy Review and Inter-Agency Liaison in the Directorate of Overseas Citizens Services (“OCS”) of the Bureau of Consular Affairs, provided a Declaration concerning judicial assistance in Brazil in two cases in the District Court for the District of New Jersey. *Wheaton v. Porreca*, Civil No. 00-2205 and *United States v. Porreca*, Civil No. 99-5943. Excerpts below from the Declaration address procedures concerning the taking of depositions in that country by foreign persons. In a Supplemental Declaration of October 29, 2001, Mr. Betancourt also stated that “the Brazilian prohibition on taking depositions by foreign persons extends to telephone or video teleconference depositions initiated from the United States of a witness in Brazil.”

The full text of the two Declarations is available at [www.state.gov/s/l](http://www.state.gov/s/l). Information on judicial assistance by country is available at <http://travel.state.gov>.

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2. OCS is responsible, *inter alia*, for receiving and transmitting requests for international judicial assistance under 28 USC 1781 (See 22 CFR Section 92.67), as well as for other legal assistance requests that foreign States may make via the diplomatic channel to the United States, including those for which assistance may be available under 28 USC 1782.

3. OCS is also responsible for other aspects of international judicial assistance for the United States Department of State, including obtaining host country clearance for the travel of U.S.

Government officials abroad to conduct depositions, interviews, inspections or other activities related to discovery. This responsibility is derived from U.S. consular treaty obligations, 22 USC 4215, 4221, 22 CFR Part 92 et. seq., Rule 28(b), Federal Rules of Civil Procedure, and authority delegated to the Bureau of Consular Affairs by the U.S. Secretary of State. OCS's judicial assistance functions are set forth in Volume 7, Foreign Affairs Manual, Chapter 900 which is available via the internet at the U.S. Department of State, Bureau of Consular Affairs home page link at <http://travel.state.gov>.

4. Judicial assistance between the United States and Brazil in civil and administrative matters is governed by Article 5 (f) and (j) of the Vienna Convention on Consular Relations Relations ("VCCR"), 21 U.S.T. 77 (See Exhibit "A"), customary international law and the practice of nations, and applicable U.S. and local Brazilian law and regulations. Article 5 of the Vienna Convention on Consular Relations provides that consular functions consist in:

- (f) acting as a notary and civil registrar and in capacities of a similar kind, and performing certain functions of an administrative nature, provided there is nothing contrary thereto in the laws and regulations of the receiving State;
- (j) transmitting judicial and extra-judicial documents or executing letters rogatory or commissions to take evidence for the courts of the sending State in accordance with international agreements in force or, in the absence of such international agreements, in any other manner compatible with the laws and regulations of the receiving State.

5. The United States has endeavored to obtain authoritative guidance from the Government of Brazil regarding the procedures it considers acceptable under Brazilian law and practice, and under its interpretation of the Vienna Convention on Consular Relations concerning obtaining evidence in Brazil. Despite extensive consultations for many years, the United States has not received clear written guidance from the Government of Brazil on this subject. Ministry of External Relations officials have advised the U.S. Embassy verbally that Brazilian authorities do *not* recognize the



authority or ability of foreign persons, such as American attorneys, to take depositions before a U.S. consular officer, with the assistance of a Brazilian attorney, or in any other manner.

6. Ministry officials explained that the taking of depositions for use in foreign courts constitutes an act of procedural law and, as such, must be undertaken in Brazil only by Brazilian judicial authorities. The Ministry also cited as an implicit principle of Brazilian Constitutional Law that only Brazilian judicial authorities are competent to perform acts of a judicial nature in Brazil. In view of this position, Brazil has advised it would deem taking depositions in Brazil by foreign persons to be a violation of Brazil's judicial sovereignty. Such action could result in the arrest, detention, expulsion, or deportation of the American attorney or other American participants. Subsequent attempts by the U.S. Embassy to clarify the issue with Brazilian authorities proved unsuccessful. The United States recognizes the right of judicial sovereignty of foreign governments based on customary international law and practice; see, e.g., the Restatement (Third) of Foreign Relations Law (1987).

7. U.S. Government executive branch officials traveling abroad are subject to the authority from the U.S. ambassador or chief of mission whose authority is derived directly from the President of the United States. See Section 207 of the Foreign Service Act of 1980, 22 USC Section 3927, which charges U.S. ambassadors and chiefs of mission with full responsibility for the direction, coordination, and supervision of all U.S. Government executive branch officers and employees in the country to which they are accredited. President Bush has recently reaffirmed the authority of the Chiefs of Mission.

8. U.S. Government executive branch officials traveling abroad for a purpose related to international judicial assistance must obtain the permission of both the U.S. embassy (or the U.S. Department of State acting on the Embassy's behalf) and the foreign State. . . .

9. In our experience, foreign host governments may regard travel of U.S. Government officials in judicial assistance matters as a violation of judicial sovereignty unless advanced clearance has been obtained through diplomatic channels. The United States has similar requirements with respect to the travel of foreign government officials to the United States in judicial assistance mat-

ters (18 USC 951, 28 CFR 73). Travel abroad without prior clearance can result in the arrest, detention, expulsion, or deportation of the U.S. Government official. The request for host country clearance for the travel of U.S. Government officials to participate in the taking of a deposition in Brazil requires the transmittal of a note verbale via diplomatic channels from the U.S. Embassy in Brasilia to the Brazilian Ministry of External Relations.

10. Most foreign States, including Brazil, will not permit the participation of foreign judges in the deposition of a witness located in the foreign State. For a general discussion of participation of judges in foreign depositions, see, *Cumulative Digest of United States Practice in International Law, 1981–1988*, Vol. II, 1400, 1402, Department of State (1994). But see, *Administrative Office of the U.S. Courts, Guide to Judiciary Policies and Procedures*, Vol. III, *Judges' Manual*, February 1988, trans. 2, vol. III, chap. XV, p. 3, Sec. B.1.c.

11. Article 41 of the Vienna Convention on Diplomatic Relations, 23 UST 3227, provides that:

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the receiving State. They also have a duty not to interfere in the internal affairs of that State.

Similarly, U.S. Government officials traveling abroad in an official capacity are expected, in accordance with customary international law and practice, to respect the laws of the foreign country. In the case of diplomats assigned to a foreign country, this is an international obligation under Article 41 of the Vienna Convention on Diplomatic Relations . . . .

12. Absent specific authorization from the Ministry of External Relations of Brazil, the U.S. Embassy or U.S. Consulates in Brazil cannot participate in any way in the deposition. See, *Restatement (Third) of Foreign Relations Law*, 441–442. See also, interpretive notes, Rule 28(b), *Federal Rules of Civil Procedure* which provides “effectiveness and even availability, of one of the methods Rule 28(b) provides for taking of depositions in foreign

countries depends largely upon law of depositions in foreign countries depends largely upon law of foreign country in which deposition is to be taken.” *Zassenhaus v. Evening Star Newspaper Co.*, 404 F2d 1361, (D.C. Cir. (1968), 131 App DC 384.

13. The U.S. Department of State would advise U.S. citizens, both U.S. Government officials and private citizens, contemplating participation in a deposition in Brazil without the concurrence of the host to consider carefully the impact of such an action, including possible arrest, detention or deportation.

14. Should the U.S. District Court desire that the U.S. Department of State send a formal note verbale requesting permission to conduct the deposition in the captioned case either before U.S. consular officers or through local Brazilian legal counsel with U.S. Department of Justice officials participating fully or observing, OCS will make arrangements for the U.S. Embassy in Brasilia to transmit an urgent note verbale to the Ministry of Foreign Affairs. We note, however, that given recent general discussions with Brazilian authorities regarding judicial assistance between our two countries, we do not expect that Brazil would alter its position in this matter, and cannot predict how long it might take the Ministry to respond to the inquiry.

## 2. Medallion Stamp Guarantees

On May 1, 2001, the Department provided guidance to American posts abroad on responding to requests to perform a service known as a “medallion signature guarantee” or a “medallion stamp guarantee.” The telegram explained that these services are not notarial services and cannot be provided by posts. It explained further that “a medallion signature guarantee is a special signature guarantee for the transfer of securities,” providing “a guarantee by the transferring financial institution that the signature is genuine and the financial institution accepts liability for any forgery.”

The full text of the telegram is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

**Cross References**

*Consular access to U.S. citizen in North Korea.* Chapter 1.A.1.  
*Consular and immigration issues in USA PATRIOT Act.* Chapter 19.C.4.b.

*Lack of consular notification not within scope of Alien Tort Statute,* Chapter 6.G.5.a.(3).

## CHAPTER 3

### International Criminal Law

#### **A. EXTRADITION AND OTHER RENDITIONS, AND MUTUAL LEGAL ASSISTANCE**

##### **1. Rule of Specialty: Applicability to State Prosecution**

In 1992 Frederick Nigel Bowe, a citizen of The Bahamas, was extradited from The Bahamas to stand trial in the U.S. District Court for the Southern District of Florida on federal charges related to the importation and distribution of illegal narcotics. Bowe was tried, convicted, and sentenced. After Bowe completed his sentence in a federal institution in New Jersey, in April 2001 the State of Florida sought his extradition from New Jersey for trial on state charges. These state charges had not been included in the United States' request for Bowe's extradition from the Bahamas.

The U.S.-Bahamas Extradition Treaty includes a standard formulation of the "rule of specialty" in Article 14(1):

A person extradited under this Treaty may only be detained, tried, or punished in the Requesting State for the offense for which extradition was granted [with certain exceptions, none applicable here.]

On April 27, 2001, the Embassy of The Bahamas sent a diplomatic note to the U.S. State Department noting the request for extradition from Florida to New Jersey and inquiring whether it needed to take any steps to effect Bowe's return to The Bahamas in accordance with the Treaty.

Following consultations between federal officials and Florida officials, the State of Florida withdrew its request to extradite Bowe from New Jersey, on the basis of the United States' treaty obligation. Bowe was then allowed to return to The Bahamas, as explained in a Press Release issued by the U.S. Embassy in The Bahamas on May 2, 2001:

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The Embassy of the United States of America, following consultations with the Bahamian Ministry of Foreign Affairs and Office of the Attorney General, has confirmed that the U.S. Department of Justice communicated with the appropriate Florida State prosecutor concerning the State of Florida's request for the extradition of Mr. Bowe from New Jersey. In light of the terms of Mr. Bowe's 1992 extradition from the Bahamas, and the United States' obligations under the extradition treaty with the Bahamas, the Florida State prosecutor has decided to withdraw Florida's request for Mr. Bowe's extradition from New Jersey. This withdrawal will clear the way for Mr. Bowe's deportation to the Bahamas.

## **2. Presumption Against Bail**

Pavel Borodin was arrested in the United States on January 17, 2001 for extradition to Switzerland on charges of money laundering and participation in a criminal organization in violation of the Swiss Criminal Code. The charges alleged abuse of his position, held prior to January 2000, as head of the administrative directorate of the office of Presidential Affairs of the Russian Federation, overseeing construction of government buildings. Borodin's applications for bail were denied on January 25, 2001 and again on March 9, 2001. On March 21, 2001, the Federal District Court for the Southern District of New York denied his petition for a writ of habeas corpus pending a hearing on a formal request for his extradition. *Borodin v. Ashcroft*, 136 F. Supp. 2d 125 (E.D.N.Y. 2001). The court denied the habeas petition, finding, among other things, that Borodin's position as State Secretary of the Union of the Russian Federation and Belarus founded in January 2000 did not constitute the kind of "special circumstances"

required to overcome the presumption against bail in extradition cases. *Id.* at 131. Following this decision, Borodin waived further extradition procedures and surrendered voluntarily to Swiss police, departing the United States in their custody on April 6, 2001.

Excerpts from a letter brief filed by the United States on March 8, 2001, provide its views opposing the bail application.

The full texts of the letter brief and Exhibit D, a letter from Linda Jacobson, Assistant Legal Adviser for Diplomatic Law, U.S. Department of State, to the magistrate judge providing the views of the United States on the inviolability of the Russian Consulate General as relevant to the case are available at [www.state.gov/s/l](http://www.state.gov/s/l).

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### A. The Presumption Against Bail

As stated in the government's letter of January 24, 2001, there is a strong presumption against bail in extradition cases. As the Supreme Court held in *Wright v. Henkel*, 190 U.S. 40, 62 (1903), when a foreign government makes a proper request under a valid extradition treaty, the United States is *obligated* to deliver the person sought after he or she is apprehended. As the Supreme Court also recognized, this is

an obligation which it might be impossible to fulfill if release on bail were permitted. The enforcement of the bond, if forfeited, would hardly meet the international demand; and the regaining of the custody of the accused obviously would be surrounded with serious embarrassment.

*Id.* at 62.

In addition to its legal obligation, the United States has a compelling interest in fulfilling its duties under extradition treaties. It is important that the United States be regarded in the international community as a country that honors its agreements in order to be in a position to demand that other nations will meet their reciprocal obligations to the United States.

Accordingly, a respondent in an extradition proceeding bears a heavy burden in seeking release on bail. Specifically, as the Respondent concedes, he must establish both that there are “special circumstances” warranting his release *and* that he is not a flight risk. (Respondent’s Memorandum of Law (“Resp. Mem.” at 9)). In this case, the Respondent cannot make either showing.

## **B. The Lack of Special Circumstances**

At the January 25, 2001 bail hearing, the Court held that the Respondent’s position as State Secretary of the Union of the Russian Federation and Belarus (“the Union”) might constitute a “special circumstance” requiring his release on bail if the Respondent could make a “sufficiently detailed showing of the nature of the important work that Mr. Borodin does . . . .” (January 25, 2001 Transcript at 90).

## **Political Considerations**

In alleging “special circumstances,” Mr. Borodin claims that he is engaged in important political work for two sovereign nations, Russia and Belarus, and relies, in part, on an affidavit from Aleksander Lukashenko, the President of the Republic of Belarus and Chairman of the Supreme State Council of the Union, the highest position in the Union. As an initial matter, the State Department’s Human Rights Report on Belarus, submitted to the Senate Foreign Relations Committee on February 26, 2001, states that “Most members of the international community . . . do not recognize the legitimacy of . . . Aleksander Lukashenko’s continuation in office beyond the legal expiration of his term in July 1999. . . . (Exhibit A).<sup>1</sup> The State Department has also not whole-

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<sup>1</sup> The State Department’s report is entitled to substantial deference from the Court. *See* Jacques Semmelman, “Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings,” 76 Cornell L. Rev. 1198, 1234 (1991) (“[a] statute requires the State Department to prepare and submit to Congress an annual report on human rights conditions throughout the world. By entrusting this responsibility to



heartedly endorsed the Union. As (then) Deputy Secretary of State Strobe Talbott said in 1999:

[I]ntegration among the New Independent States must reflect the voluntary will of the people expressed through the democratic process, must be mutually beneficial, and must not erect barriers to integration with the wider community of nations. A democratic process does not now exist in Belarus, and that calls into question the legitimacy of efforts there to realize a genuine Russian-Belarusian Union.

(Exhibit B).

Moreover, Mr. Borodin has another, more appropriate, avenue through which he can pursue his political claims. Courts consider legal, not political issues. The latter are committed by the extradition statutes (18 U.S.C. §§ 3184 and 3186) to the United States Secretary of State, who determines after a judicial determination of extraditability whether in fact to surrender the fugitive. As Respondent's counsel has written, this statutory provision provides the Secretary of State with the opportunity to weigh political considerations that may not be considered by courts during the litigation of the relevant legal issues. *See Semmelman, "Federal Courts, the Constitution, and the Rule of Non-Inquiry in International Extradition Proceedings,"* 76 Cornell L. Rev. 1198, 1202, 1229. Or, stated another way by the Second Circuit:

the judicial officer's inquiry is confined to the following: whether a valid treaty exists; whether the crime charged is covered by the relevant treaty and whether the evidence marshaled in support of the complaint for extradition is sufficient under the applicable standard of proof. . . . the Secretary of State has sole discretion to weigh the political and other consequences of extradition and to determine finally whether to extradite the fugitive.

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the Department of State, Congress has manifested its confidence in that Department's ability to act as a responsible and impartial human rights observer in foreign lands.")

*United States v. Cheung*, 213 F.3d 82, 88 (2d Cir. 2000).

Accordingly, to the extent that Mr. Borodin's application is based on political considerations, the Court should defer consideration of such issues to the Secretary of State, who can evaluate them in making the ultimate decision as to whether Mr. Borodin should be extradited.

Finally, Mr. Borodin's argument overlooks the significant concerns of two other sovereign nations — the United States and Switzerland. These countries have a paramount interest in assuring that, if Mr. Borodin is certified extraditable, he be available for surrender.

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### The Effect of Releasing Mr. Borodin on Bail

Even accepting that facilitating Mr. Borodin's return to work is a worthwhile goal, Mr. Borodin's application suggests that his release on bail would not have any significant impact on his work with the Union. The whole thrust of Mr. Borodin's application is that the effective management of the Union requires his physical presence on a day to day basis. *See, e.g.*, Resp. Mem. at 8 ("Ultimately Mr. Borodin's personal presence will be required at the helm of the Constant Committee of the Union.") (Resp. Mem. at 8); Selivanov Affidavit (Resp. Ex. F at ¶ 5, ("The presence of . . . Mr. P.P. Borodin is necessary for carrying out the joint programs of the Union") and Kasyanov Affidavit (Resp. Ex. B) (use of "technical opportunities" would only ease Mr. Borodin's absence "in part.")). However, Mr. Borodin concedes that even if on bail, he would not be able to manage the Union on a day to day basis or participate in the March 17, 2001 Supreme State Council meeting. (Resp. Mem. at 8).

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[T]he application makes clear that Mr. Borodin's release on bail would only minimally broaden his participation in the Union by simply allowing him to send and receive faxes and participate in meetings by teleconference more easily. By contrast, as set forth below, releasing Mr. Borodin on bail would create a substantial opportunity for him to flee. In evaluating Mr. Borodin's application, the Court should weigh the risk of flight against the marginal

improvements in Mr. Borodin's ability to participate in the Union and conclude that no "special circumstance" exists in this case.

### C. The Respondent is a Flight Risk

Mr. Borodin presents an overwhelming risk of flight. The cases relied upon by Respondent make clear that, in evaluating whether an extraditee is a flight risk, courts focus on the extraditee's ties to the United States and grant bail only upon a showing of strong ties to some community in the United States—a showing that is entirely absent in this case.

For example, in *United States v. Taitz*, 130 F.R.D. 442, 445, (S.D. Cal. 1990), the court relied upon the fact that the defendant was a permanent United States resident with substantial ties to the Southern California-Nevada area, was seeking to become a United States citizen, had invested substantial time and effort in building a business in the United States and had no means to leave the United States. Similarly, in *Hu Yau-Leung v. Soscia*, 500 F. Supp. 1382, 1382 (E.D.N.Y. 1980), *affirmed in part and reversed in part*, 649 F.2d 914 (2d Cir. 1981), the district court noted that the respondent had been living in the United States with his parents for "some years," was enrolled in a public school where he had made a "good adjustment," and had many friends among his contemporaries. In *Nacif-Borge*, 829 F. Supp. at 1221, the court based its decision in part on the fact that the defendant had strong ties to Las Vegas and had purchased a residence there. In *Extradition of Morales*, 906 F. Supp. 1368, 1377 (S.D. Cal. 1995), the court gave weight to the fact that the defendant was a United States citizen who had lived in San Diego with his wife and children for 14 years, had been employed in the United States for 17 years, and had two children who were enrolled in San Diego public schools. In *Extradition of Kirby*, 106 F.3d 855, 858 (9th Cir. 1997), the court noted that all three extraditees had "strong ties of family and friendship in California" and that bail had been set so that "each man's family and friends would pay a high financial price if he attempts to flee." The Second Circuit has also made clear that even very strong ties to the United States are often not sufficient to warrant an extraditee's release on bail. For example, in *United States v. Leitner*, 784 F.2d 159, 159 (2d

Cir. 1986), the Second Circuit affirmed the district court's decision to deny bail to an extraditee who was a United States citizen, had grown up in the United States, had been living openly with his parents in Queens at the time of his arrest, had a New York City taxi license in his own name, and had completed a semester at Pace Law School.

The cases relied upon by the Respondent also demonstrate that, in evaluating risk of flight, courts consider the respondent's motive and opportunity (or lack thereof) to return to his home country. For example, in both *Morales*, 906 F. Supp. at 1377 and *Nacif-Borge*, 829 F. Supp. at 1221, the courts relied on the fact that the respondents had demonstrated a "sincere desire" not to return to Mexico. In *Taitz*, 130 F.R.D. at 445, the court noted that the respondent had no place to go other than South Africa and that there were substantial limitations on his ability to obtain a visa or to immigrate and that he had no assets to fund flight. In *Sindona*, 450 F. Supp. at 674, the respondent had left Italy several years prior to the extradition proceeding and had not returned there since. Finally, in *Leitner*, the court noted that the respondent had fled from Israel, where he was the subject of death threats. 784 F.2d at 159.

Evaluation of Mr. Borodin's application in light of these standards makes clear that he presents a substantial risk of flight if released on bail. In contrast to all of the cited cases, Mr. Borodin has not claimed *any* ties to the United States. In contrast to the situation in *Taitz*, Mr. Borodin's substantial financial resources and position in the Union provide him with the means to flee. *See also Hababou v. Albright*, 82 F. Supp. 2d 347, 352 (D.N.J. 2000) ("financial wherewithal and potential international safe harbors, . . . would [provide] enormous incentive and opportunity to flee.") Moreover, in contrast to *Morales*, *Nacif-Borge*, *Taitz*, *Sindona* and *Leitner*, he has every motive to flee to Russia, particularly in light of the fact that the Russian government has exonerated him of all criminal wrongdoing and has repeatedly stated that his personal presence is required to administer the affairs of the Union on a day to day basis. (Resp. Mem. at 8, 13)<sup>2</sup>.

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<sup>2</sup> Mr. Borodin's contention that he poses no risk of flight because he has not been charged with a crime in Switzerland (Resp. Mem. at 13) is absurd. As the Court is aware, Mr. Borodin is the subject of two Swiss war-

#### D. The Respondent's Proposed Bail Package is Inadequate

Rather than attempting to identify any ties to the United States, the Respondent again relies on the assurances of the Russian Ambassador made at the January 25, 2001 bail hearing. However, at the bail hearing, the Court pointed out that such assurances had to be evaluated in light of the fact that the Russian government could change its position or that the Russian government itself could change. (Transcript of January 25, 2001 at 67).

Respondent's contention that the Ambassador's assurance "constitutes a solemn obligation, binding on the Government of Russia as a matter of law" (Resp. Mem. at 14) is inaccurate and his reliance on the Restatement (Third) of the Foreign Relations Law of the United States (1987) (the "Restatement") is misplaced. Section 301 of the Restatement defines an international agreement as "an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law." Comment b to Section 301 provides that a "unilateral statement" (such as Ambassador Ushakov's representation at the bail hearing) "is *not* an agreement, but may have legal consequences and may become a source of rights and obligations on principles analogous to estoppel." (emphasis added). Restatement (Third) The Foreign Relations Law of the United States Section 301, Reporter's Note 3. Accordingly, as set forth in the attached letter to the Court from the United States Department of State, "[t]he cited sections of the Restatement are not relevant . . . in the absence of mutual agreement between two or more states." (Exhibit D).

Moreover, the Russian government's assurances do not provide an adequate remedy in the event of breach. As stated in the

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rants seeking his arrest for money laundering and participation in a criminal organization. Moreover, the diplomatic note contained in the Swiss Extradition Request states unambiguously that "Mr. Borodin is wanted by the Swiss authorities to be prosecuted and stand trial for the facts that are mentioned in the enclosed warrants, specifically for money laundering and participation in a criminal organization." The Court should also reject Mr. Borodin's argument that he is not a flight risk because he is not "a fugitive" and did not flee Switzerland. *See Hababou*, 82 F. Supp. 2d at 352 (rejecting the notion that an extraditee is not a flight risk because he is not a "fugitive in the sense of one who flees from criminal charges.")

government's letter of January 24, 2001, Article 61, Section 1 of the Russian Constitution provides that citizens of the Russian Federation "may not be deported out of Russia or extradited to another state." The Respondent has never disputed that the Russian Constitution prohibits Russia from deporting him and his current application does not explain how this Constitutional impediment would be overcome if Mr. Borodin fled to Russia or the Russian Consulate.

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The Respondent's offer to post an unspecified cash bond also does not warrant his release. The Respondent and his associates in the Russian and Belarussian governments clearly control substantial assets and may well be willing to forfeit money in order to prevent Borodin's criminal prosecution in Switzerland. More importantly, though, in contrast to a domestic bail situation, in which forfeiture of a bond provides the prosecuting authority with compensation in the event of breach, forfeiture in this case would leave the Swiss government without any remedy. In short, the primary obligation of the United States government in this case is to satisfy its treaty obligation to Switzerland by delivering Mr. Borodin for prosecution. None of the measures suggested by the Respondent provide adequate assurance that the government will be able to meet that obligation. Accordingly, his application to be released on bail should be denied.

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### **3. Reviewability of Secretary of State's Decision to Surrender Fugitive Alleging Violation of Torture Convention**

Under United States law governing extradition, the Secretary of State is the U.S. official responsible for determining ultimately whether to surrender a fugitive to a country requesting extradition. The Secretary makes this decision only after an extradition judge certifies a fugitive's extraditability on the basis of a hearing to examine whether extradition would be lawful under the terms of the treaty and the relevant provisions of United States law. *See* 18 U.S.C. §§ 3181–3196. In this case, Ramiro Cornejo-Barreto had been arrested and

found extraditable by a U.S. Magistrate in response to a request for extradition from the Government of Mexico to stand trial for violent robbery, homicide, injuries, deliberate property damage, kidnapping, and firing a weapon upon a person. On October 2, 1997, Cornejo-Barreto filed his first habeas petition, claiming, among other things, that the Magistrate's order certifying extraditability violated Article 3 of the Torture Convention. Article 3 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention") prohibits a Party from extraditing a person to a country "where there are substantial grounds for believing that he would be in danger of being subjected to torture." The Torture Convention entered into force for the United States on November 20, 1994, and the United States enacted implementing legislation as part of the Foreign Affairs Reform and Restructuring Act, which is codified as 8 U.S.C. § 1231 note ("FARR"). Pursuant to the FARR, the State Department adopted regulations, 22 C.F.R. § 95, to implement Article 3 of the Convention.

Cornejo-Barreto's first habeas petition was denied. *Cornejo-Barreto v. Seifert*, SA CV 97-843 AHS (C.D.Cal.) (Oct. 7, 1998). On appeal to the U.S. Court of Appeals for the Ninth Circuit, the court affirmed denial of the petition but directed that it "be without prejudice to the filing of a new petition should the Secretary of State decide to surrender" Cornejo-Barreto. 218 F.3d 1004, 1017 (2000). The court did not consider the issue presented by the petitioner on appeal, *i.e.*, whether the Torture convention was "self-executing" and provided judicially enforceable individual rights, holding that such a claim was not ripe before the Secretary of State made his extradition decision. *Id.* at 1008. Instead, the panel majority addressed the question of "what procedures are available to petitioner to assert his rights under the Torture Convention and the timing thereof." *Id.* at 1007. The court determined that the Secretary of State's extradition decision was not "committed to agency discretion by law," and that no statute precluded judicial review. Therefore, it concluded that once the Secretary of State made his extradition decision, review of that decision would

be available under the Administrative Procedure Act, 5 U.S.C. § 704. *Id.* at 1012–15.

Under standard State Department procedures, Cornejo-Barreto submitted a number of documents for the Secretary of State's consideration in determining whether to authorize extradition. The Secretary signed a warrant of extradition for Cornejo-Barreto on June 30, 2000. In deference to the Ninth Circuit's earlier decision, the Department departed from standard practice and informed Cornejo-Barreto of the surrender decision and delayed extradition to allow him an opportunity file a habeas petition. The Department also advised Mexican Government officials of the delay.

Cornejo-Barreto filed a second petition for habeas corpus on July 12, 2001. In the petition he renewed arguments that Article 3 of the Torture Convention barred his extradition. On October 9, 2001, the United States filed its Opposition to Petition for Habeas Corpus. The excerpts from the Opposition set forth below provide the views of the United States that the Secretary of State's extradition decision is in all cases, including those in which a claim of torture is raised, an exercise of discretion not subject to judicial review.

The full texts of the Opposition and of the attached Declaration of Samuel Witten, Assistant Legal Adviser for Law Enforcement and Intelligence, U.S. Department of State, providing a general overview of the process of extraditing a fugitive from the United States to a foreign country, are available at [www.state.gov/s/l](http://www.state.gov/s/l).

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## INTRODUCTION

A century of well-settled extradition law vests sole discretion in the Secretary of State to make a final surrender decision after a fugitive has been certified extraditable, and Congress has confirmed, through its passage of the Foreign Affairs Reform and Restructuring Act ("FARR Act"), that this discretion should remain unreviewable when there are allegations that extradition could subject an individual to torture in the receiving country.



Nonetheless, a recent opinion by a divided panel of the United States Court of Appeals for the Ninth Circuit, *Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (2000) (“*Cornejo-Barreto I*”), suggests that judicial review of the Secretary of State’s extradition decision is available under the Administrative Procedure Act where there are allegations of torture. Although the United States respectfully submits that the panel’s conclusions about the availability of judicial review are both dicta and erroneous, the government recognizes that this Court may determine that it is bound to follow the Ninth Circuit’s reasoning. Accordingly, the attached Declaration of Samuel M. Witten (“Witten Decl.”) (Attachment 1) and the legal discussion *infra* are submitted in order to brief this Court and preserve the government’s rights to appeal an adverse decision from the Court relating to review of the Secretary of State’s decision. Furthermore, the government requests that, should this Court determine that it must follow the Ninth Circuit’s analysis and grant Ramiro Cornejo-Barreto’s (“Cornejo-Barreto”) petition, the Court also enter a stay of that decision so that Cornejo-Barreto would remain in custody pending an appeal to the Ninth Circuit or the Supreme Court. Such a stay is warranted not only by the government’s likelihood of ultimate success, but by the danger that would be posed to the public by Cornejo-Barreto’s release.<sup>1</sup>

By not submitting an administrative record for this Court to review, the government does not in any way concede or suggest that petitioner is likely to be tortured if he is returned to Mexico, or that the Secretary’s decision to extradite Mr. Cornejo-Barreto was not fully in accordance with law. However, for many of the reasons outlined below, including the fact that the Secretary’s extradition decision may involve the most sensitive matters of foreign policy, judicial review of his decision and the considerations underlying it prior to a final determination after any appeal on the issue of jurisdiction would be inappropriate.

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<sup>1</sup> As explained in more detail *infra*, Magistrate Judge Elgin Edwards certified that there was probable cause to believe that Cornejo-Barreto had committed numerous felonies, including murder, in Mexico in 1989.

### C. The Secretary of State's Consideration of Requests for Extradition Where Torture Claims are Raised

Although, for the reasons discussed below, the government declines to submit an administrative record underlying the Secretary of State's decision to surrender Cornejo-Barreto and subject the Secretary's decision to APA review, the attached Witten Declaration outlines the general procedures and considerations involved when the Secretary makes an extradition determination when the issue of torture has been raised by the fugitive or other interested parties. In making that determination, the Secretary considers whether it is more likely than not that the particular fugitive will be tortured in the country requesting extradition. Witten Decl. ¶ 8; 22 C.F.R. § 95.2(b).

Appropriate policy and legal offices within the State Department review and analyze information relevant to the particular case in preparing an extradition recommendation to the Secretary. Witten Decl. ¶ 6. These offices include the Bureau of Democracy, Human Rights, and Labor, which drafts the U.S. Government's annual Human Rights Reports, as well as the relevant regional bureau, country desk, or U.S. Embassy. *Id.* The Department considers information concerning judicial and penal conditions and practices of the requesting country, including the Department's Human Rights Reports, and the possible relevance of that information to the individual whose surrender is at issue. *Id.* ¶ 7. The Department will examine materials submitted by the fugitive, persons acting on his behalf, or other interested parties and other relevant materials that may come to its attention. *Id.*

Based on the analysis of the relevant information, the Secretary may decide to surrender the fugitive, to deny surrender, or to condition the extradition on the requesting State's provision of assurances related to torture or other aspects of the requesting State's criminal justice system that protect against mistreatment, such as that the fugitive will have regular access to counsel and the protections afforded under that State's laws. The decision to seek assurances is made on a case-by-case basis. Witten Decl. ¶ 8.

Evaluating the need for assurances, and assurances obtained, can involve sensitive and complex judgments about the identity, position, or other information relating to the official relaying the assurances, as well as political or legal developments in the

requesting State that would provide context for the assurances provided, and the U.S.'s diplomatic relations with the requesting State. The Department officials analyzing the information may make a judgment regarding the requesting State's incentives and capacities to fulfill its assurances. *See* Witten Decl. ¶ 9. The State Department may also ask governmental or non-governmental human rights groups to monitor the condition of a fugitive once he is extradited. *Id.* ¶ 10.

The Department's ability to seek and obtain assurances from a requesting State depends in part on the Department's ability to treat these dealings with discretion. *Id.* ¶ 11. If the Department was required to make such communications public, it could impede frank communication from a requesting State. *Id.* ¶ 12. In addition, judicial decisions overturning a determination made by the Secretary after extensive discussions and negotiations could seriously undermine our foreign relations as well as add delays to what is already a lengthy process. *Id.* ¶ 13.

## ARGUMENT

### A. The Ninth Circuit Panel's Opinion is Dicta and Therefore Not Binding on This Court

In order to establish a right to judicial review of the Secretary's extradition decision, Cornejo-Barreto's second petition for habeas corpus relies entirely on the authority of the Ninth Circuit panel's decision in *Cornejo-Barreto I*. However, that portion of that decision is not binding on this Court.

First, as the panel itself stated, the APA can only provide review of final agency actions and, therefore, plaintiff's petition had to be dismissed because it was not ripe. *Cornejo-Barreto I*, 218 F.3d at 1016. At the time the panel issued its decision, the Secretary of State had not even had an opportunity to consider Cornejo-Barreto's torture claims, nor had he ordered petitioner's surrender to Mexico. Because, as the panel noted, 28 U.S.C. § 2241 "confers jurisdiction only when no other relief is available to petitioner," 218 F.3d at 1006, and because Article III of the Constitution limits a federal court's power to decide "cases and controversies" actually before it, the Court lacked jurisdiction to

reach any issue other than the one actually pending before it (footnote omitted). Consideration of the question what would happen *after* the Secretary of State made a decision was simply beyond the Ninth Circuit's power before such a decision was made.

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Finally, the panel's discussion of the APA and future judicial review meets the classic definition of *dicta*, as it is "not necessary to the decision" in the case.<sup>6</sup> See *Export Group v. Reef Industries, Inc.* 54 F.3d 1466, 1472 (9th Cir. 1995) (citing Black's Law Dictionary definition of "dictum"). . . .

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## B. This Court Lacks Jurisdiction to Review the Secretary of State's Decision

### 1. The Background of the Rule of Non-Inquiry

Prior to the Ninth Circuit's decision in *Cornejo-Barreto I*, it was well-settled law that, except where Congress has provided otherwise, "[e]xtradition is a matter of foreign policy entirely within the discretion of the executive branch." *Lopez-Smith v. Hood*, 121 F.3d 1322, 1326 (9th Cir. 1997). See also *Cornejo-Barreto I*, 218 F.3d at 1010. In particular, with respect to humanitarian claims, courts have recognized that it is not for the judiciary to engage in an assessment of a foreign nation's practices and that such determinations are properly left to the Secretary of State. See e.g. *Matter of Requested Extradition of Smythe*, 61 F.3d 711, 714 (9th Cir. 1995) ("courts are ill-equipped as institutions and ill-advised as a matter of separation of powers and foreign relations policy to make inquiries into and pronouncements about the workings of foreign countries' justice systems"); *U.S.*

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<sup>6</sup> One court has, in passing, described the *Cornejo-barreto I* panel's decision about the availability of APA review as a holding of the Court. See *Barapind v. Reno*, 225 F.3d. 1100, 1106 (9th Cir. 2000). However, this statement was made in a background section of that opinion and the *Barapind* Court did not address this issue in reaching its decision on the issue before it, specifically whether the Board of Immigration Appeals could properly hold an asylum application in abeyance pending resolution of parallel extradition proceedings. Thus, the *Barapind* description of that portion of *Cornejo-Barretto I* as a holding is itself *dicta*.

*v. Kin-Hong*, 110 F.3d 103, 110 (1st Cir. 1997)(the “rule of non-inquiry, like extradition procedures generally, is shaped by concerns about institutional competence and by notions of separation of powers”); *Ahmad v. Wigen*, 910 F.2d 1063, 1066–67 (2d Cir. 1990). Accordingly, all courts that had considered the issue, including the Ninth Circuit, had agreed that the Secretary of State’s decision on whether to extradite a fugitive certified extraditable is final and “not subject to judicial review.” *Id.*<sup>8</sup> This “rule of non-inquiry” has been held to apply even after the United States signed on to the Torture Convention, *see id.*, and after the FARR Act went into effect. *See Sandhu v. Burke*, 2000 WL 191707 at \*\*8–9 (S.D.N.Y. 2000). *See also Cornejo-Barreto I*, 218 F.3d at 1010 (citing *Lopez-Smith v. Hood* for the proposition that “[b]efore the implementing regulations were adopted, we held that no judicial review of the Secretary’s decision was available.”).

## 2. The History of the Torture Convention and the FARR Act Indicate that Congress Did Not Intend to Give Courts a Broader Role in Extradition Determinations

It was in this legal context that the United States became a party to the Torture Convention and Congress passed implementing legislation calling for the promulgation of regulations. The *Cornejo-Barreto I* panel appears to have found in these actions an intent on the part of Congress to overrule the precedent establishing the rule of judicial non-inquiry. However, as explained more fully below, the history of the Torture Convention and its implementing statute far more readily support the opposite conclusion: that Congress went to substantial effort to definitively preclude judicial review of extradition decisions.

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<sup>8</sup> Forty years ago, in *Gallina v. Fraser*, 278 F.2d 77, 79 (2nd Cir. 1960), the Second Circuit suggested that the rule of non-inquiry may not apply when the extraditee would be subject to procedures or punishment “antipathetic to . . . a sense of decency.” The Second Circuit recently repudiated the *Gallina* dictum, however. *Ahmad*, 910 F.2d at 1066. The panel in *Cornejo-Barreto I* noted that a few courts had discussed the possibility of a humanitarian exception to the rule of non-inquiry, but it acknowledged that there were no identified cases in which such an exception had ever been applied.

The Torture Convention was adopted by the United Nations General Assembly on December 10, 1984, and it entered into force June 26, 1987. *See* S. Exec. Rep. 101–30, 101st Cong., 2d Sess. at 2 (1990). Article 3 of the Convention provides:

1. No State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the state concerned of a consistent pattern of gross, flagrant or mass violations of human rights.

S. Treaty Doc. 100-20, 100th Cong. 2d Sess. (1988).

The United States signed the Convention on April 18, 1988, and the Senate gave its advice and consent to ratification on October 27, 1990. The treaty entered into force for the United States in November 1994. *See* U.S. Department of State, *Treaties in Force*, 472 (2000); 22 C.F.R. § 95.1(a). The Senate conditioned its advice and consent to ratification upon a Resolution of Ratification declaring "that the provisions of Articles 1 through 16 of the Convention are not self-executing." 136 Cong. Rec. S17486-01 at S17492 (Oct. 27, 1990); S. Exec. Rep. 101–30 at 31. Likewise, the Senate Report regarding the Torture Convention, to which the Resolution of Ratification was appended, included the Administration's analysis that the term "competent authorities" in Article 3 "appropriately refers in the United States to the competent administrative authorities who make the determination whether to extradite, expel, or return. . . . *Because the convention is not self-executing, the determinations of these authorities will not be subject to judicial review in domestic courts.*" S. Exec. Rep. 101–30 at 17–18 (emphasis added). There is nothing to suggest that the Senate did not concur in that analysis.

In 1998, Congress enacted the Foreign Affairs Reform and Restructuring Act, Pub. L. 105–277, § 2242, 112 Stat. 2681, codified at 8 U.S.C. 1231 note. The first provision of the FARR Act

simply paraphrased Article 3 of the Torture Convention, noting it to be “the policy of the United States not to expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture.” *Id.* § 2242(a). The FARR Act directed the Department of State to prescribe regulations to implement the obligations of the United States under Article 3 of the Torture Convention. *Id.* § 2242(b).

Significantly, § 2242(d) of the FARR Act provides:

Notwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section, and nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or this section, or any other determination made with respect to the application of the policy set forth in subsection (a), except as part of the review of a final order of removal [in immigration cases].

As required by the FARR Act, the State Department adopted regulations to implement Article 3 of the Torture Convention. *See* 22 C.F.R. § 95.1. These regulations provide that “the Secretary is the U.S. official responsible for determining whether to surrender a fugitive to a foreign country by means of extradition,” 22 C.F.R. § 95.2(b), and that, in extradition cases where allegations regarding torture have been made, “appropriate policy and legal offices review and analyze information relevant to the case in preparing a recommendation to the Secretary as to whether or not to sign the surrender warrant.” 22 C.F.R. § 95.3(a). Thereafter, “[b]ased on the resulting analysis of relevant information, the Secretary may decide to surrender the fugitive to the requesting State, to deny surrender of the fugitive, or to surrender the fugitive subject to conditions.” *Id.* at § 95.3(b). These regulations further provide that “[d]ecisions of the Secretary concerning surrender of fugitives for extradition are matters of executive discretion not subject to judicial review.” 22 C.F.R. § 95.4.

### 3. Review of the Secretary's Decision is Not Available Under the Administrative Procedure Act

The *Cornejo-Barreto I* panel concluded that, as “final agency action for which there is no other adequate remedy in a court,” *see* 5 U.S.C. § 704, the Secretary of State’s extradition decision was reviewable under the Administrative Procedure Act (“APA”) once the regulations implementing the FARR Act had been promulgated.<sup>9</sup> 218 F.3d at 1010. The court noted that review is not available, however, “to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion.” 5 U.S.C. § 701(a). Here, both proscriptions apply to make judicial review of the Secretary of State’s extradition decision improper.

#### *a. The FARR Act Precludes Judicial Review of the Secretary's Decision*

The *Cornejo-Barreto I* panel erred in analyzing whether the FARR Act precluded judicial review, considering only a single phrase in one provision of the Act, § 2242(d), and determining that, on its face, it served only to preclude review of the regulations promulgated by the Secretary.<sup>10</sup> The panel erred in relying on that one lone phrase, failing to consider the remainder of the text as well as the “structure, and purpose of the Act,” *see Dalton v. Specter*, 511 U.S. 462, 479 (1994) (Souter J., concurring), for evidence of a Congressional intent to preclude judicial review. Plenty of such evidence exists here, most unreviewed by the *Cornejo-Barreto I* panel. In fact, both the ratification of the Torture Convention and its implementing legislation demonstrate that Congress intended

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<sup>9</sup> In the scheme set out by the North Circuit in *Cornejo-Barreto I*, the habeas statute, 28 U.S.C. § 2241, provides the independent grant of jurisdiction for a court to review the Secretary of State’s action, while the APA provides only the cause of action and a limited waiver of sovereign immunity. *Califano v. Sanders*, 430 U.S. 99 (1977).

<sup>10</sup> Section 2242(d) provides, “[n]otwithstanding any other provision of law, and except as provided in the regulations described in subsection (b), no court shall have jurisdiction to review the regulations adopted to implement this section.”



to preclude judicial review of the Secretary of State's extradition decisions.

With respect to the Torture Convention itself, the Senate expressly conditioned its advice and consent to this treaty upon a declaration providing "that the provisions of Articles 1 through 16 of the Convention *are not self-executing*." 136 Cong. Rec. S17486-01 at S17492 (Oct. 27, 1990)(emphasis added). At a minimum, a non-self-executing treaty does not confer any judicially enforceable rights upon a private party. *Whitney v. Robertson*, 124 U.S. 190 (1888) (if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect."); *United States v. Postal*, 589 F.2d 862, 876 (5th Cir. 1979); *Restatement (Third) of Foreign Relations Law of the United States*, § 111(4)(a), at 43 (1987). Accordingly, the Senate's declaration that Article 3 of the Torture Convention was not "self-executing" itself demonstrates that, at the time of ratification, the Senate did not intend to subject extradition proceedings to judicial review for compliance with the Torture Convention.

The FARR Act, passed several years after the United States became a party to the Torture Convention, evidences exactly the same intent. The Act specifically provides that: "[N]otwithstanding any other provision of law . . . nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Torture] Convention or this section . . . except as part of the review of a final order of removal [in immigration cases]." 8 U.S.C. 1231 note, § 2242(d). This unambiguous language demonstrates that, by passing this statute, Congress did not intend to provide judicial review of torture claims in extradition cases. *See also* H.R. Conf. Rep. No. 432, 105th Cong., 2nd Sess. at 150 ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"<sup>11</sup>). The panel majority's statement that this language simply "prohibits courts from reading an implied cause of action into the statute," 218 F.3d at 1015, has no support. . . .

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<sup>11</sup> The reference to "most claims" presumably reflects the fact that judicial review of certain Attorney General decisions in the immigration context is explicitly permitted under the FARR Act.

Considered against the backdrop of a longstanding history of no review, the above statutory language alone is sufficiently clear to “preclude judicial review.” 5 U.S.C. § 701(a)(1).

Further, the *Cornejo-Barreto I* opinion makes no reference to the judicial review language in the regulations promulgated under the authority of the FARR Act, except to state that Congress only expressly insulated the regulations—and not the Secretary’s extradition determinations—from challenge. 218 F.3d at 1013. But the regulations on their face state that there is no judicial review of the Secretary’s extradition decisions, *see* 22 C.F.R. § 95.4, and the statute on its face precludes judicial review of the regulations. Moreover, the regulations deserve substantial deference as published agency interpretations of the FARR Act because Congress explicitly delegated to the Secretary the authority to “implement” the obligations of the United States under the Torture Convention. § 2242(b); *see Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where there is congressional delegation of administrative authority, courts must defer to reasonable agency interpretation); *compare Adams Fruit Co. Inc. v. Barrett*, 494 U.S. 638, 649–50 (1990) (deference due to regulations addressing courts’ jurisdiction if Congress delegated the authority to address it).

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Finally, even if the language of the FARR Act could somehow be interpreted as leaving open the availability of judicial review under the APA, choosing such an interpretation may raise serious constitutional concerns. The rule of non-inquiry that prevailed prior to the *Cornejo-Barreto I* decision, though wrongly dismissed by the *Cornejo-Barreto I* court as merely “federal common law,” has constitutional underpinnings. “The rule of non-inquiry arises from recognition that the executive branch has exclusive jurisdiction over the country’s foreign affairs.” *Matter of Extradition of Sandhu*, 886 F. Supp. 318, 321 (S.D.N.Y. 1993); *see also Quinn*, 783 F.2d at 789; *Ahmad*, 910 F.2d at 1067. Extradition proceedings “necessarily implicate the foreign policy interests of the United States.” *Escobedo v. United States*, 623 F.2d 1098, 1105 (5th Cir. 1980). Both because the Constitution vests the power to conduct foreign relations in the political, *i.e.*, the

executive and legislative, branches of the government, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); *Freedom to Travel Campaign v. Newcomb*, 82 F.3d 1431, 1439 (9th Cir. 1996), and because courts are “ill-equipped” to assess the adequacy of reasons behind executive decisions concerning foreign policy, serious constitutional questions are posed by the judicial review contemplated in *Cornejo-Barreto I.*<sup>13</sup>

At a bare minimum, these questions should weigh heavily in this Court’s consideration of the FARR Act’s proper construction. It is axiomatic that, “where an otherwise acceptable construction of a statute would raise serious constitutional problems, the [Supreme] Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *United States v. Winstar Corp.*, 518 U.S. 839, 875 (1996) (plurality opinion); see *Immigration and Naturalization Service v. St. Cyr*, [533] U.S. [289], 121 S.Ct. 2271, 2279 (2001);<sup>14</sup> *Public Citizen v. U.S. Department of Justice*, 491 U.S. 440, 466 (1989); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building and Constr. Trades Council*, 485 U.S. 568, 575 (1988); *Ashwander v. TVA*, 297 U.S. 288, 348 (1936). This “cardinal principle” applies even if a merely “serious doubt of constitutionality is raised.” *Zadvydas v. Davis*, [533] U.S. [678]; 121 S. Ct. 2491, 2498 (2001) quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

These admonitions are particularly relevant here. In the absence of clear evidence of Congressional intent to give the courts a new role in reviewing Executive Branch foreign policy judgments, evi-

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<sup>13</sup> The underpinnings of the doctrine of non-inquiry are analogous to those underlying the political question doctrine. See e.g., *Baker v. Carr*, 369 U.S. 186, 210 (1962). The political question doctrine argues against judicial intervention in this area because courts lack judicially manageable standards for determining, *inter alia*, the credibility of a requesting State’s assurances and whether an individual is likely to be tortured, and because the conduct of diplomatic and foreign affairs is trusted to the political branches of the federal government. *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952); *Escobedo*, 623 F.2d at 1105.

<sup>14</sup> In *St. Cyr*, the Supreme Court held that the right of aliens to petition for habeas corpus was not revoked by recently-enacted statutes. The holding has no bearing on this case, however, as here the government is not arguing that *Cornejo-Barreto* lacks the right to petition for habeas corpus; the disagreement here is on the nature of the Court’s review of the Secretary of State’s decision to extradite.

dence that is entirely lacking in the history and text of the FARR Act, this court is bound to ascertain whether an alternative construction of the FARR Act “is fairly possible by which the [constitutional] question may be avoided.” *Public Citizen*, 491 U.S. at 465–66 (quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

*b. The Secretary’s Extradition Decision is Committed to his Discretion by Law*

Even if the FARR Act did not directly “preclude” review under 5 U.S.C. § 701(a)(1), review would be barred under § 701(a)(2) because the Secretary of State’s resolution of a Torture Convention claim is “agency action [that] is committed to agency discretion.” The *Cornejo-Barreto I* opinion ignored this rule, concluding that the rule of non-inquiry was “clearly superseded[ed]” by the FARR Act because the FARR Act imposed a “duty” on the United States that diminishes the wholly discretionary element of the Secretary’s decision. 218 F.3d at 1014.

However, it is hardly self-evident that the FARR Act imposes a mandatory duty of the sort that is judicially reviewable. Notably, the substantive standard of the Torture Convention is merely paraphrased in the statute, and it is couched in terms of “policy,” rather than “duty.” FARR Act § 2242(a) (“It shall be the *policy* of the United States not to expel, extradite, or otherwise effect the involuntary return of any person . . . [where] there are substantial grounds for believing the person would be in danger of . . . torture”) (emphasis added). Moreover, the Senate took great pains to clarify that the Convention was not self-executing.

In addition, the “obligation” of the United States under Article 3 of the Torture Convention is to refuse extradition if the “competent authorities,” taking into account “all relevant considerations,” determine that there are substantial grounds for believing that there is a danger of torture. *See* Art. 3 Torture Convention, reprinted at 22 C.F.R. § 95.2. Under the FARR Act, the competent authority for the United States is the Secretary of State. It is for the Secretary of State to determine what considerations are relevant in determining whether a fugitive is “likely to face torture.” Such a standard “fairly exudes deference” to the decision-maker, *Webster v. Doe*, 486 U.S. 592, 600, and strongly suggests

that the statute's implementation was "committed to agency discretion by law." *Id.*

In determining what categories of administrative decision are not reviewable under § 701(a)(2), the Supreme Court has considered whether certain types of decision have, by tradition, been left to agency discretion. *Lincoln v. Vigil*, 508 U.S. 182, 191 (1993) (holding that allocation of lump sum appropriation was traditionally committed to agency discretion, and thus was unreviewable). Thus, in *Heckler v. Chaney*, 470 U.S. 821 (1985), the Supreme Court held that an agency's decision not to enforce has traditionally been committed to agency discretion, and accordingly would be presumptively unreviewable under § 701(a)(2). In *Webster v. Doe*, the Court refused to review a decision by the Director of Central Intelligence to terminate an employee in the interests of national security, "an area of executive action 'in which courts have long been hesitant to intrude.'" *Lincoln v. Vigil*, 508 U.S. at 192 (citing *Webster*). Similarly, there is a long tradition of judicial non-inquiry into matters relating to extradition that must inform a court's decision on whether the Secretary's decision to extradite Cornejo-Barreto is reviewable under § 701(a)(2).

Like the enforcement decision held unreviewable in *Heckler*, the decision to extradite in the face of a torture claim requires "a complicated balancing of a number of factors which are peculiarly within [the agency's] expertise." *Heckler*, 470 U.S. at 831. The decision to surrender in the face of a torture claim is based on foreign policy assessments and predictions, *see* Witten Decl. ¶¶ 7–10, that are beyond the expertise of the judicial branch. If, for example, the Secretary accepts the assurance of a country that, despite a history of human rights problems in that country, the person will not be tortured, a district court or court of appeals could evaluate this decision only by second-guessing the expert opinion of the State Department that such an assurance can be trusted. The Secretary may have to evaluate such issues as whether to seek assurances from the country requesting extradition; the nature and sufficiency of communications with foreign governments; the identity of the appropriate individuals from whom to seek assurances; and the role of non-governmental organizations in monitoring the treatment of extraditees. *Id.* The Secretary may also evaluate the requesting State's incentives and capacities to

fulfill any assurances made to the United States. *Id.* ¶ 9. It is difficult to think of judgments less appropriate for judicial review.

Moreover, to the extent that judicial review of the Secretary's extradition decision would require the disclosure of State Department officials' judgments and assessments on the likelihood of torture, which could include judgments on the reliability of information and representations provided and its communications with the requesting State, such disclosure could itself be harmful to our foreign policy. Disclosure could chill important sources of information and could interfere with the ability of our foreign relations personnel to interact effectively with foreign States. Witten Decl. ¶ 11. Consistent with the diplomatic sensitivities that surround the Department's communications with requesting States concerning torture allegations, the Department does not make public its decisions to seek assurances in particular extradition cases. *Id.* Seeking assurances may be seen as raising questions about the requesting State's institutions or commitment to the rule of law, even where the assurances are only sought to ensure that the foreign government is aware of the concerns that have been raised. *Id.* If the Department were required to make public its communications with a requesting State concerning allegations of torture, that State, as well as other States, would likely be reluctant in the future to communicate frankly with the United States concerning the treatment of fugitives who have raised allegations of torture. *Id.* ¶ 12.

Even if confidentiality of communications and judgments could be protected by a Court, judicial review of the Secretary's extradition decision would add delays to the already lengthy extradition process. *Id.* ¶ 13. These additional delays could impair a State's ability to prosecute a fugitive by the time he is returned, and it could also harm our efforts to press other countries to act more quickly in surrendering fugitives for trial in the United States. *Id.* Finally, a judicial decision overturning a determination made by the Secretary after negotiations with a foreign State on assurances could also undermine our foreign relations. *Id.*

For all of these reasons, the Secretary's decision on whether to extradite a fugitive where torture allegations have been raised is, and should be, committed to his discretion by law.

As previously stated, if the Court disagrees with defendant's analysis and determines that it must follow the Ninth Circuit's

analysis in *Cornejo-Barretto I*, defendant requests, in order to save this important issue for appeal, that the Court enter judgment granting Cornejo-Barretto's petition and enter a stay of grant of that decision so that Cornejo-Barretto would remain in custody pending any appeal to the Ninth Circuit and/or the Supreme Court. A court should consider four factors in determining whether to grant a stay of a decision to grant a petition for habeas corpus: "1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether issuance of the stay will substantially injure the other parties interested in the proceedings; and 4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). The "possibility of flight" and the "risk that the prisoner will pose a danger to the public if released" are both factors to be considered. *Id.* at 777. Here, as the government has shown above, the government has a strong likelihood of success on the merits of its claim. In addition, Magistrate Judge Edwards certified that there was probable cause to believe that Cornejo-Barretto had committed numerous felonies, including murder, in Mexico. Given the seriousness of these crimes and the fact that plaintiff already fled Mexico, there is a strong possibility of flight and that plaintiff would pose a danger to the public if released. Therefore, a stay of any decision to grant Cornejo-Barretto's petition for habeas corpus is warranted.

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#### 4. Trial *In Absentia* in the United States

On July 19, 2001, after four years of extradition proceedings in France, Ira Einhorn was extradited to the United States to stand trial for the murder of a young woman in 1977. Einhorn had fled the United States in January 1981 during an early stage of his trial in Philadelphia where the murder had occurred. On September 29, 1993, Einhorn was convicted *in absentia* in the Court of Common Pleas of Philadelphia and sentenced to life in prison. In 1995, the Pennsylvania Supreme Court upheld the denial of an appeal of the 1993 conviction that had been filed on Einhorn's behalf, *Commonwealth v. Einhorn*, 655 A.2d 984 (Table) (Pa. 1995). In the spring of 1997

the U.S. learned that Einhorn was living in France and requested his extradition. He was located and arrested by French law enforcement authorities on June 13, 1997.

From the outset, Einhorn resisted extradition on the ground that Pennsylvania law provided no possibility for a new trial after his *in absentia* conviction. The Bordeaux Court of appeal denied the extradition request on December 4, 1997, holding that Einhorn's conviction after a trial *in absentia* violated the French public order and the European Convention on Human Rights because he was not guaranteed the possibility of retrial.

On January 31, 1998, a new law took effect in Pennsylvania that would have the effect of permitting Einhorn a new trial if he were extradited by France. The U.S. submitted a second extradition request, assuring French authorities that Einhorn could receive a new trial if extradited by France to the United States. The new request also reiterated an assurance previously conveyed to French authorities that the crimes for which Einhorn was accused did not carry the death penalty and he would therefore not be subject to the death penalty if extradited.

On July 21, 2000, French Prime Minister Jospin signed an extradition decree approving Einhorn's extradition. Following denial of an appeal to the French Conseil d'Etat on July 12, 2001, Einhorn lodged an application with the European Court of Human Rights ("ECHR"), complaining that his extradition would violate Articles 3 and 6 of the European Convention on Human Rights. He argued that his extradition would violate Article 3's prohibition on "torture or . . . inhuman or degrading treatment or punishment" because he faced a risk of being sentenced to death and being exposed to the "death-row phenomenon," or likely to have to serve a life sentence without any real possibility of remission or parole. He also argued that his extradition would violate the right to a fair trial under Article 6 of the Convention because the 1998 Pennsylvania law had been enacted with the sole aim of influencing the judicial outcome of the extradition proceedings in France, because he had not been provided effective and sufficient guarantees that he would be entitled to a new trial in Pennsylvania and because



even if he had a new trial, it could not satisfy the requirements of Article 6.

On October 16, 2001, the ECHR rejected Einhorn's complaints as "manifestly ill-founded within the meaning of Article 35 § 3 of the Convention" noting, among other things, the U.S. assurance that he would not face the death penalty and information provided by the United States concerning the availability of a new trial and the ability of the Governor of Pennsylvania to commute a life sentence. *Einhorn v. France*, Application no. 71555/01, Final Decision as to Admissibility (Oct. 16, 2001).

The opinion of the ECHR is available at [www.echr.coe.int/Eng/Judgments.htm](http://www.echr.coe.int/Eng/Judgments.htm).

## 5. Reports to Congress

On January 17 and July 13, 2001, the Secretary of State submitted reports to Congress pursuant to the requirements of § 3203 of Title III, Chapter 2 of the Emergency Supplemental Act, as enacted in the Military Construction Appropriations Act, 2001, Pub. L. 106-246. Title III of the Emergency Supplemental Act appropriates funds for the foreign assistance package known as "Plan Colombia," to support the fight against narcotrafficking by Colombia as well as efforts of nine other countries in the region. The excerpts below from the first report provide general information on extradition relations with the ten countries receiving counternarcotics assistance from the U.S. under Title III.

The full text of the two reports is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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### REPORT ON INTERNATIONAL EXTRADITION PURSUANT TO SECTION 3203 OF THE EMERGENCY SUPPLEMENTAL ACT, 2000, AS ENACTED IN PUBLIC LAW 106-246

This report is submitted by the Secretary of State to the Committee on Foreign Relations, the Committee on the Judiciary, and the

Committee on Appropriations of the Senate; and the Committee on International Relations, the Committee on the Judiciary, and the Committee on Appropriations of the House of Representatives in response to the requirements of section 3203 of Title III, Chapter 2 of the Emergency Supplemental Act, as enacted in the Military Construction Appropriations Act, 2001, Public Law 106–246. Title III of the Emergency Supplemental Act appropriates funds for the foreign assistance package known as “Plan Colombia.” The text of section 3203 is attached hereto as Tab A.

As required by section 3203(a)(1), this Report begins with factual information about persons whose extradition has been requested from each of the following ten countries that are receiving counternarcotics assistance from the United States under Plan Colombia: Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Panama, Peru, Trinidad and Tobago, and Venezuela.<sup>1</sup> As discussed further below, this data was assembled at the request of the State Department by the Office of International Affairs of the Criminal Division of the Department of Justice.

As required by sections 3203(a)(2) and 3203(a)(3), this Report then discusses specific aspects of these ten countries’ cooperation with the United States in the area of international extradition. Because sections 3203(a)(2) and 3203(a)(3) are linked in substance, they are discussed together below. The information in the discussion of these sections reflects the input of the Department of Justice.

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### **Response to Sections 3203(a)(2) and 3203(a)(3)—Efforts to Extradite to the United States, Analysis of Obstacles to Extradition, and Steps Taken to Overcome these Obstacles**

#### **General Discussion**

The following general overview puts into context the discussion that follows about the U.S. Government’s experiences in international

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<sup>1</sup> The Conference Report, House Rept. 106–710, at 172, clarifies that the section 3203 report is to address those countries receiving counternarcotics assistance from the U.S. under Title III of the Emergency Supplemental Act.

extradition with Bolivia, Brazil, Colombia, Costa Rica, Ecuador, El Salvador, Panama, Peru, Trinidad and Tobago, and Venezuela.

The United States has extradition treaties in force with each of the ten countries listed above. For nine of these countries, outgoing extradition requests from the United States are acted upon under the bilateral extradition treaties—Bolivia, Brazil, Costa Rica, Ecuador, El Salvador, Panama, Peru, Trinidad and Tobago, and Venezuela. The processing of U.S. extradition requests to Colombia, however, is conducted under that country's national extradition law. The Government of Colombia, unlike the United States Government, can extradite fugitives under its domestic law without reference to a treaty, and extradites fugitives to the United States on that basis.<sup>3</sup>

Some of the U.S. Government's international extradition relationships with these countries are notably busier than others. As reflected in the charts in Tab B, for example, the United States has made many more extradition requests to Colombia than to Bolivia, El Salvador, or Panama. This disparity in experiences is reflected both in the charts at Tab B in response to section 3203(a)(1) and in the country-by-country discussions below.

All of the countries that are the subject of this report are cooperating with the United States in good faith, whether under a bilateral extradition treaty or under their domestic extradition law.

As in any extradition relationship, there are reasons why not all extradition requests (both to and from the United States) have been granted. Many of the U.S. Government's relationships with countries in the region are governed by older extradition treaties that need to be updated.<sup>4</sup> The United States has embarked on an

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<sup>3</sup> The Supreme Court of Colombia ruled in 1986, four years after the 1979 U.S.-Colombia Extradition Treaty had entered into force, that the Colombian legislation that brought the treaty into force was invalid. The United States considers the treaty to be in force, and to remain legally binding as a matter of international law on both parties. In a recent case, a U.S. district court accepted the State Department's declaration that the treaty is in force, and could serve as a legal basis to extradite persons to Colombia. Even though Colombia has been unable to rely on the provisions of the treaty to arrest and extradite fugitives at the request of the United States, the Government of Colombia has used its domestic extradition law to extradite persons to the United States.

<sup>4</sup> The oldest treaties in the group of ten countries discussed in this report are with Peru (treaty signed in 1899), Panama (1904), El Salvador

ambitious program of modernizing many of the older bilateral extradition treaties, particularly with countries with which there is, or is expected, a significant law enforcement need to carry out extraditions. In October 1998, as part of the largest group of law enforcement treaties ever heard at once, the U.S. Senate considered and approved eighteen extradition treaties—sixteen were completely new treaties and two were protocols to existing treaties.<sup>5</sup> In October 2000 the U.S. Senate considered and approved completely new extradition treaties with four additional countries.<sup>6</sup>

Over time, the United States hopes to update all of the bilateral treaty relationships in the region. With respect to the ten countries covered under this report, the United States has brought into force new modern extradition treaties with Bolivia and with Trinidad and Tobago, has nearly completed negotiating a new extradition treaty with Peru, and expects to embark on extradition treaty negotiations with El Salvador in 2001. New treaties with modern features, including extradition of nationals, definition of extraditable offenses in terms of dual criminality, and the provisional arrest of fugitives, will strengthen the ability of the United States to have persons returned to face criminal charges.

The United States as a matter of policy draws no distinction between nationals and non-nationals in extradition. One of the

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(1911), Ecuador (1872, as supplemented in 1939), and Venezuela (1922). More modern treaties in this group of countries are with Brazil (1961), Costa Rica (1982), Bolivia (1995), and Trinidad and Tobago (1996). As noted above in footnote 3, the United States has an extradition treaty with Colombia that was signed in 1979, and entered into force in 1982, but U.S. extradition requests are being handled under Colombia's national laws.

<sup>5</sup> The sixteen completely new treaties approved by the Senate in 1998 are with Antigua and Barbuda, Argentina, Austria, Barbados, Cyprus, Dominica, France, Grenada, India, Luxembourg, Poland, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and Zimbabwe. The two protocols were with Mexico and Spain. The sixteen new treaties include the key provisions contained in modern treaties that are discussed later in this report, such as extradition based on dual criminality as opposed to a list of offenses. Of the sixteen completely new treaties, fifteen replaced pre-existing treaty relationships. The treaty with Zimbabwe established an extradition treaty relationship with that country for the first time.

<sup>6</sup> The four new treaties approved in October 2000 are with Belize, Paraguay, South Africa, and Sri Lanka.

U.S. Government's key negotiating priorities in determining new extradition treaty negotiations is to identify countries that are willing to extradite their nationals and update those treaty relationships as expeditiously as possible. In the last five years, the United States has updated its treaties in this hemisphere with Bolivia, Argentina and Paraguay after those countries agreed to include a treaty clause enabling the extradition of nationals under some or all circumstances. The United States also benefits from Colombia's December 1997 constitutional amendment to permit extraditing its nationals to the United States under its domestic law.<sup>7</sup> Trinidad and Tobago has long extradited its nationals under extradition treaties applicable between the United States and that country. The U.S. Government intends to continue and expand this trend. Over time, the Departments of State and Justice would also like to update the treaties with Brazil, Costa Rica, Ecuador, El Salvador, Panama, Peru, and Venezuela, particularly when those countries are prepared to extradite their nationals.<sup>8</sup> Peru and El Salvador have already indicated a willingness to pursue treaties that provide for extradition of nationals and the United States has embarked on the process of working with those countries to develop appropriate new treaties.<sup>9</sup>

The Departments of Justice and State have been pursuing vigorous, across-the-board efforts to convince individual countries and the world community that refusal of extradition on the ground of nationality is no longer appropriate, given the ease of flight and the increasingly transnational nature of crime. In addition to pursuing this issue vigorously in treaty negotiations, U.S. diplomats and U.S. law enforcement officials, with the active personal leadership of Attorney General Reno, have made eliminating restrictions on the extradition of nationals a high priority in

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<sup>7</sup> Other countries in the region such as Mexico and the Dominican Republic in recent years have also exercised authority under their domestic law and the applicable extradition treaty to extradite their nationals to the United States.

<sup>8</sup> At this time, Colombia is extraditing nationals pursuant to its 1997 constitutional amendment and domestic law. For now, the Departments of Justice and State are working on updating bilateral treaties with other countries in the region.

<sup>9</sup> El Salvador amended its Constitution in July 2000 to authorize the extradition of nationals pursuant to treaty.

bilateral dialogues with other countries. These efforts have already had notable successes, beginning to achieve what the United States hopes will be an overall reversal of a well-entrenched and long-standing tradition in many countries, often enshrined in constitutions and national law.

Apart from the issue of extradition of nationals, however, it bears noting that not every request for extradition results in a fugitive being delivered to the requesting country. Frequently fugitives are not returned for very legitimate reasons which are grounded in international extradition law and practice. This is true both for requests to and from the United States.

For example, sometimes nations seeking extradition (including the United States) do not have recent specific information on where a fugitive is located and therefore might make multiple contingency requests for provisional arrest and extradition. In other cases, fugitives learn from the press or third parties they are being sought and flee or go into hiding. Extradition treaties themselves provide specific bases on which extraditions can be delayed or denied. The obligation to extradite under a bilateral extradition treaty is not absolute and protections are built in to accommodate both U.S. and foreign legal and policy interests. While the exact terms of such exceptions result from country-specific negotiations and thus vary somewhat among the treaties, legitimate limitations endorsed by the United States may include requirements that the conduct be criminalized in the requested state in addition to the requesting state; that the offenses be of a sufficiently serious character in both countries; and that evidence presented be sufficient to meet the relevant treaty's provisions or the constitutional or other legal requirements for detention of persons in the requested state. In some cases, including in the courts of the United States, extradition requests lead to lengthy judicial proceedings and challenges spanning years.<sup>10</sup>

Moreover, most of the U.S. Government's modern treaties have provisions where the requested state can deny extradition

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<sup>10</sup> In the United States, international extradition decisions can be challenged by fugitives through seeking a writ of habeas corpus and challenging habeas corpus decisions through levels of appeal in U.S. federal courts. Other countries, including those that are the subject of this report, typically have similar rights to challenge under their domestic laws, such as the right to seek judicial writs of *amparo*, *tutela*, or similar measures.

absent assurances regarding the imposition of the death penalty, or if the crime in question is a political or military offense, or if extradition would present double jeopardy problems for the requested state. Many treaty relationships have provisions limiting the obligation to extradite where the statute of limitations of the requested state has run for the conduct in question. Finally, the nation where a fugitive is located is typically under no obligation to interrupt its own criminal prosecution of the same fugitive to accommodate a request for extradition from another nation, a principle that is recognized in all of the U.S. Government's modern extradition treaties.

The United States is also working with other countries in the hemisphere, including the ten countries that are the subject of this report, to promote judicial reform and respect for the rule of law. This includes extensive training programs for judges, prosecutors and police, encouragement of strong professional ethics standards, and reform of the criminal justice laws and procedures. These steps will help combat the potential for corruption, and instill public confidence in the integrity of the courts of justice. As these reforms take root, the extradition of fugitives—along with other aspects of the criminal justice systems—should become more transparent and efficient.

As a result of the Summits of the Americas and the initiation of regular meetings among justice ministers of the hemisphere, the 34 democratic countries of the Western Hemisphere are also engaged in a multilateral effort to improve extradition practice and procedures. At the March 1999 Justice Ministerial in Lima, Peru, the ministers endorsed a U.S. proposal to develop extradition "checklists," glossaries of commonly-used legal terms, and other instruments to provide guidance on extradition procedures that would help eliminate errors in the preparation of documents that have led in the past to the denial of extraditions that are requested. A working group has been formed at the Organization of American States to identify contact points in individual governments on extradition and to gather the necessary documentation. The March 2000 Justice Ministerial in San Jose, Costa Rica, provided an occasion for the ministers to reaffirm their interest in improving extradition practice and to bring judges into the discussion as well. There is a clear understanding by all countries

slated to benefit from assistance under Plan Colombia, as reflected in commitments through the Summit of the Americas and Justice Ministerials, of the need to develop and maintain effective domestic criminal justice systems and effective systems of international cooperation in law enforcement.

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## **B. INTERNATIONAL CRIMES**

### **1. Terrorism**

PRELIMINARY NOTE: Issues related to international terrorism that were part of the response to the attack on the United States by terrorists on September 11, 2001, are provided in Chapter 19.

#### ***a. Patterns of Global Terrorism: 2000***

On April 30, 2001, the Department released its annual report *Patterns of Global Terrorism: 2000*. The report is submitted in compliance with Title 22 of the United States Code, § 2656f(a), which requires the Department of State to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria of § (a)(1) and (2) of the Act. As required by legislation, the report includes detailed assessments of foreign countries where significant terrorist acts occurred and countries about which Congress was notified during the preceding five years pursuant to § 6(j) of the Export Administration Act of 1979 (the so-called terrorist-list countries that have repeatedly provided state support for international terrorism). In addition, the report includes all relevant information about the previous year's activities of individuals, terrorist organizations, or umbrella groups known to be responsible for the kidnapping or death of any US citizen during the preceding five years and groups known to be financed by state sponsors of terrorism. The excerpt below provides the definition of "terrorism" used in the Report.



The full text of the report is available at [www.state.gov/s/ct/rls/pgtrpt/2000](http://www.state.gov/s/ct/rls/pgtrpt/2000).

No one definition of terrorism has gained universal acceptance. For the purpose of this report, however, we have chosen the definition of terrorism contained in Title 22 of the United States Code, Section 2656f(d). That statute contains the following definitions:

- The term “terrorism” means premeditated, politically motivated violence perpetrated against noncombatant\* targets by subnational groups or clandestine agents, usually intended to influence an audience.
- The term “international terrorism” means terrorism involving citizens or the territory of more than one country.
- The term “terrorist group” means any group practicing, or that has significant subgroups that practice, international terrorism.

The US Government has employed this definition of terrorism for statistical and analytical purposes since 1983.

Domestic terrorism is probably a more widespread phenomenon than international terrorism. Because international terrorism has a direct impact on US interests, it is the primary focus of this report. However, the report also describes, but does not provide statistics on, significant developments in domestic terrorism.

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\* For purposes of this definition, the term “noncombatant” is interpreted to include, in addition to civilians, military personnel who at the time of the incident are unarmed or not on duty. For example, in past reports we have listed as terrorist incidents the murders of the following US military personnel: Col. James Rowe, killed in Manila in April 1989; Capt. William Nordeen, US defense attache killed in Athens in June 1988; the two servicemen killed in the Labelle discotheque bombing in West Berlin in April 1986; and the four off-duty US Embassy Marine guards killed in a cafe in El Salvador in June 1985. We also consider as acts of terrorism attacks on military installations or on armed military personnel when a state of military hostilities does not exist at the site, such as bombing against US bases in Europe, the Philippines, or elsewhere.

**b. Verdict in Libya terrorist case: Pan Am 103**

On January 31, 2001, a Scottish Court sitting in The Netherlands reached its decision in the trial of two Libyans accused of the bombing of Pan Am Flight 103 over the town of Lockerbie, Scotland, in which 270 people died on December 21, 1988. The Court, which was established expressly for the purpose of trying the two Libyans, found Abdel Basset al-Megrahi guilty of murder and concluded that there was insufficient evidence to find Al-Amin Khalifa Fahima guilty. At the end of 2001, the appeal by Abdel Basset al-Megrahi was still pending in Scottish court. The verdict in itself did not impact the status of UN sanctions against Libya. As the Statement by the White House press secretary set forth below makes clear, Libya had not satisfied the requirements of the UN Security Council Resolutions for the lifting of the sanctions.

Cases brought by Libya in 1992 against the United States and the United Kingdom at the International Court of Justice arising out of the same incident are still pending. *Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* and *(Libyan Arab Jamahiriya v. United States of America)*. In those cases, Libya maintains that the United States and United Kingdom breached their legal obligations under the Montreal Convention of September 23, 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation by, among other things, demanding that Libya surrender the alleged offenders for trial either in Scotland or in the United States. In February 1998 the Court found that there existed disputes between the Parties concerning the interpretation or application of the Montreal Convention and that it had jurisdiction to hear the disputes on the basis of Article 14, paragraph 1, of the Convention. Written pleadings were completed in August 2001; no hearings have been scheduled. President Bush commented as follows on the verdict of the Scottish Court.

The text of the Statement by the White House press secretary on the Scottish court decision, set forth below, is available at [www.whitehouse.gov/news/releases/20010131-4.html](http://www.whitehouse.gov/news/releases/20010131-4.html).

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The Scottish Court presiding over the trial of the two Libyans accused of bombing Pan Am Flight 103 on December 21, 1988, has found Abdel Basset al-Megrahi guilty of murder. The Court found conclusively that the defendant caused an explosive device to detonate on board Pan Am flight 103 and murdered the flight's 259 passengers and crew as well as eleven residents of Lockerbie, Scotland. Al-Megrahi will now face a mandatory sentence of life imprisonment under Scottish law.

With respect to Al-Amin Khalifa Fahima, the Court concluded that the Crown failed to present sufficient evidence to satisfy the high standard of "proof beyond reasonable doubt" that is necessary in criminal cases. This does not mean that he is innocent of the crime charged. This verdict is a victory for an international effort and has resulted in the conviction of a member of the Libyan intelligence services. The Government of Libya must take responsibility.

The United States and the United Kingdom have made clear to the Government of Libya that the delivery of a verdict against the suspects in the Pan Am 103 trial does not in itself signify an end to UN sanctions against Libya. UN Security Council Resolutions call on Libya to satisfy certain requirements, including compensation to the victims' families and the acceptance of responsibility for this act of terrorism, before UN sanctions will be removed. The Government of Libya has not yet satisfied these requirements. The United States and the United Kingdom will consult closely and then approach the Government of Libya in the near future to discuss the remaining steps Libya must take under the UN Resolutions.

We want to express our deepest sympathy to the families of those lost in the bombing of Pan Am Flight 103. Nothing can undo the suffering this act of terrorism has caused. But we hope that this verdict will help reduce the anguish and uncertainty that the family members have endured since December 21, 1988, and that they are able to find some solace in the measure of justice achieved by this decision.

The President congratulates the Scottish prosecution team, thanks the Dutch Government for their assistance and the entire United States Government team who contributed to this outcome.

**c. Ratification of new treaties**

Ambassador Francis X. Taylor, Coordinator for Counterterrorism, and William H. Taft, IV, Legal Adviser, both of the U.S. Department of State, and Michael Chertoff, Assistant Attorney General, Criminal Division, Department of Justice, testified before the Senate Committee on Foreign Relations October 23, 2001 in support of two anti-terrorism treaties: 1) the International Convention for the Suppression of Terrorist Bombings, adopted by the UN General Assembly on December 15, 1997 and signed by the United States January 12, 1998, S. Treaty Doc No. 106-6 (1999), and 2) the International Convention for the Suppression of the Financing of Terrorism, adopted by the United Nations General Assembly on December 9, 1999, and signed on behalf of the United States on January 10, 2000, S. Treaty Doc. No. 106-49 (2000) (*See also Digest 2000*, Chapter 3.B.1). The excerpts that follow describe the effect of the two treaties and provide the views of the United States on their importance in the fight against terrorism. President Bush transmitted proposed implementing legislation to Congress on October 25, 2001. 37 WEEKLY COMP. PRES. DOC. 1561 (Nov. 5, 2001). The Senate provided advice and consent to ratification of the two treaties on December 5, 2001. The United States will ratify the treaties following enactment of the implementing legislation. At the end of the year, the House had passed the legislation (H.R. 3275), and it was pending in the Senate.

The full text of testimony by Ambassador Taylor, Legal Adviser Taft and Assistant Attorney General Chertoff is provided in S. Exec. Rept. 107-2 (2001).

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**Prepared Statement of Ambassador Francis X. Taylor**

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I appreciate the opportunity to testify, as I would like to stress the importance of these treaties on two levels: their role in the law enforcement efforts against terrorists and their place in the multilateral counterterrorism strategy we are now implementing

in concert with our traditional NATO, EU and G-7 partners, and other key foreign governments. . . .

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Mr. Chairman, the horrific events of September 11 have reinforced the need for a far reaching, coordinated approach to deal with the threat of international terrorism. Although military activities attract the most attention, they are a small part of the campaign. Because of the evolving nature of terrorism and the efforts of terrorists to conceal their activities, we must use a variety of tools such as diplomacy, foreign assistance, multilateral law enforcement cooperation, as well as military actions as appropriate. We will continue to refine and use these tools in a coordinated manner to expose terrorists' networks and supporters, wherever and whenever possible to detect and disrupt their activities.

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A key part of our diplomatic effort in the campaign is urging countries to ratify and implement all 12 of the major international terrorism conventions if they have not done so already. Our latest information from the United Nations is that 58 countries have signed and 29 have become parties to the Terrorist Bombings Convention and 58 countries have signed and four have become parties to the Terrorism Financing Convention. The Bombings Convention has been in force among other countries since May 2001, and the Financing Convention will enter into force once 22 countries deposit their instruments of ratification.

Our government will be better positioned to provide leadership in this regard once the United States itself ratifies these two Conventions before the Committee today. Every day since September 11, we see reporting of new interest and actions by other countries on the treaties.

We are working hard, both with our major western and G-7 allies as well as with the broader world community, to support coordinated and multilateral efforts. . . .

\* \* \* \*

The above steps were prompted by the emergence in recent years of groups that do not depend on state support, but largely

raise funds themselves, through contributions via charitable groups, through front companies, and through criminal activities. These funds are important to the terrorist groups in many ways, and not only for directly financing terrorist attacks. The funding also is essential for groups that operate schools, medical clinics and other facilities in order to develop broader support and help attract recruits. Some groups such as HAMAS assure potential suicide bombers that their families will later receive financial support.

It is important that people throughout the world understand that contributions to organizations that have ties to terrorist groups—even if the organizations conduct some charitable activities—also contribute to the cold-blooded murder committed by terrorists. I would like to quote from Section 301 of the 1996 Antiterrorism Act. “[F]oreign terrorist organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”

Mr. Chairman, the international conventions and the broader counterterrorism efforts of which they are a part, underscore the point that acts of terrorism—terrorist bombings, hijacking of aircraft, taking of hostages—are crimes whatever the motivation. These acts are not acceptable to the civilized world. They should not be rationalized or glamorized. They should be punished. Approval of the two Conventions before you today will help ensure that perpetrators of these heinous acts are brought to justice.

### **Prepared Statement of Hon. William H. Taft, IV**

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These two instruments follow the general models of prior terrorism conventions that the Senate has considered and approved in the past and to which the United States is already a party, such as the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, the 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, the 1979 Convention Against the Taking of Hostages, and the 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation.

## **International Convention for the Suppression of Terrorist Bombings**

\* \* \* \*

The United States initiated the negotiation of the Terrorist Bombings Convention in July 1996 in the aftermath of the June 1996 bombing attack on U.S. military personnel at the Khobar Towers in Dhahran, Saudi Arabia, in which seventeen U.S. Air Force personnel were killed. That attack followed other terrorist attacks in 1995–96 including poison gas attacks in Tokyo’s subway; bombing attacks by HAMAS in Tel Aviv and Jerusalem; and a bombing attack by the IRA in Manchester, England. The Convention fills an important gap in international law by expanding the legal framework for international cooperation in the investigation, prosecution and extradition of persons who engage in such bombings and similar attacks.

More specifically, the Convention will create a regime for the exercise of criminal jurisdiction over the unlawful and intentional use of explosives and other lethal devices in, into or against various defined public places with intent to kill or cause serious bodily injury, or with intent to cause extensive destruction of the public place. An explosive or other lethal device is defined broadly in Article 1 as “(a) an explosive or incendiary weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage; or (b) a weapon or device that is designed, or has the capability, to cause death, serious bodily injury or substantial material damage through the release, dissemination or impact of toxic chemicals, biological agents or toxins or similar substances or radiation or radioactive material.” Thus, in addition to criminalizing the unlawful use of bombs and similar explosive devices, the Convention addresses, for example, the intentional and unlawful release of chemical and biological devices.

Like earlier similar conventions, the new Convention requires Parties to criminalize under their domestic laws the offenses set forth in the Convention, if they have an international nexus; to extradite or submit for prosecution persons accused of committing or aiding in the commission of such offenses, if they have an

international nexus; and to provide one another assistance in connection with investigations or criminal or extradition proceedings in relation to such offenses.

We recommend that ratification of the Convention be subject to two proposed understandings and one proposed reservation, which would be deposited by the United States along with its instrument of ratification of the Convention. The two understandings relate to the exemptions from coverage in Article 19 of the Convention for armed forces during an armed conflict and for military forces of states at any time. The first Understanding will provide the definitions the United States will employ for the terms “armed conflict” and “international humanitarian law,” two phrases used in Article 19 that are not defined in the Convention. With this Understanding, the United States would make clear, first, that, consistent with the law of armed conflict, isolated acts of violence, for example by insurgent groups, that include the elements of the offenses set forth in the Convention would be encompassed in the scope of the Convention despite the Convention’s “armed conflict” exemption and, second, that for purposes of this Convention the phrase “international humanitarian law” has the same substantive meaning as the law of war. The second Understanding will constitute a statement by the United States noting that the Convention does not apply to the activities of military forces of states. While such an exclusion might be thought to be implicit in the context of the Convention, the Convention’s negotiators thought it best to articulate the exclusion in Article 19 in light of the relatively broad nature of the conduct described in Article 2 and the fact that this conduct overlaps with common and accepted activities of State military forces. We recommend that the United States include an Understanding to this effect in its instrument of ratification. In the Reservation, the United States will exercise its right not to be bound by the binding dispute settlement provisions of Article 20(1).

### **International Convention for the Suppression of the Financing of Terrorism**

\* \* \* \*

France initiated the negotiation of this convention in the Fall of 1998, with strong support and input from the United States,



as part of the Group of Eight Industrialized Nations initiative to combat terrorist financing. The Convention fills an important gap in international law by expanding the legal framework for international cooperation in the investigation, prosecution and extradition of persons who engage in financing terrorism.

The Convention provides for States Parties to exercise criminal jurisdiction over the unlawful and willful provision or collection of funds with the intention that they be used or in the knowledge that they are to be used in order to carry out certain terrorist acts set forth in the Convention. This new Convention requires Parties to criminalize under their domestic laws the offenses set forth in the Convention, if they have an international nexus; to extradite or submit for prosecution persons accused of committing or aiding in the commission of such offenses, if they have an international nexus; and to provide one another assistance in connection with investigations or criminal or extradition proceedings in relation to such offenses.

The Terrorism Financing Convention is aimed specifically at cutting off the resources that fuel international terrorism. Once in force, the Convention will obligate States to criminalize conduct related to the raising of money and other assets to support terrorist activities.

As stated in Article 2, a person commits an offense “if that person, by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used” to carry out terrorist acts. The first category of terrorist acts consists of any act that constitutes an offense within the scope of one of the nine counter-terrorism conventions previously adopted and listed in the Annex. The second category includes any other act intended to cause death or serious bodily injury to a civilian, or to any other person (e.g., off-duty military personnel) not taking an active part in hostilities in a situation of armed conflict, when the act has a terrorist purpose. An act has a terrorist purpose when, by its nature or context, it is intended to intimidate a population or to compel a government or international organization to do or abstain from doing any act. The offense includes “attempts,” “accomplices,” and anyone who “organizes or directs,” or “contributes” to the commission of an offense.

We recommend that ratification of the Terrorism Financing Convention be subject to a proposed Understanding and a proposed Reservation. If for any reason the U.S. has not become a party to the Terrorist Bombings Convention before or simultaneously with the ratification of the Terrorism Financing Convention, we also recommend a Declaration. The Understanding addresses two issues. First, it makes clear the understanding of the United States that nothing in the Convention precludes States Parties from conducting legitimate activities against all lawful targets in accordance with the law of armed conflict. Second, it provides the definition the United States will employ for the term “armed conflict” which is used in Article 2.1(b), but is not defined in the Convention. The Understanding achieves essentially the same objectives as the two proposed Understandings regarding the Terrorist Bombings Convention. In the Reservation, the United States will exercise its right under Article 24.2 not to be bound by the binding dispute settlement provisions of Article 24.1. The Declaration would exercise the right of the United States under Article 2.2(a) not to have the Terrorism Financing Convention’s scope encompass the financing of offenses under the Terrorist Bombings Convention until the United States becomes a Party to the Terrorist Bombings Convention.

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#### **Prepared Statement of Hon. Michael Chertoff**

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From a law enforcement perspective, the nature and breadth of the offenses covered by these instruments are of particular note. Importantly, the offenses, as well as the jurisdictional and the extradite or prosecute obligations of these instruments, encompass not only those who commit the prohibited acts, but those who attempt or conspire to commit such acts, or participate as accomplices in those acts.

In addition, the types of offenses addressed by these Conventions are core terrorism offenses. The Terrorism Financing Convention addresses a common element of every terrorist act—financing and other support. The Terrorist Bombings Convention

addresses the most utilized form of terrorism, the bombing of public places, state or government facilities, public transportation systems or infrastructure facilities, with the intent to cause death or serious bodily injury. The United States and its citizens have repeatedly been victims of such attacks, most recently, of course, in the horrific attacks of September 11th, where the hijacked planes were employed as explosive and incendiary devices against places utilized by members of the government and the public and with the intent to cause death. As such, events such as the September 11th attacks fall within the coverage of the Terrorist Bombings Convention, as would the 1998 bombings of our embassies in Tanzania and Kenya. Although the domestic regimes of most States, including the United States, have long-established penal provisions to address attacks by conventional means, the Terrorist Bombings Convention breaks important ground in forging an international framework for cooperation in preventing, detecting and bringing to justice those who plan or participate in such bombings.

Moreover, the framework of cooperation established by the Terrorist Bombings Convention applies to a wide range of terrorist offenses. Any person commits an offense within the meaning of the Convention if that person delivers, places, discharges or detonates an explosive or other lethal device in, into or against government facilities or public places. The public places covered by the Convention are defined broadly and include public transportation systems and infrastructure facilities.

The Terrorist Bombings Convention also fills important gaps in the existing international regime relating to non-conventional weapons. The Convention encompasses attacks committed with biological weapons, and hence supplements the 1972 Biological Weapons Convention; the instrument also covers attacks in public places when chemical weapons are utilized, and thus supplements the regime established by the 1997 Chemical Weapons Convention. Finally, the Terrorist Bombings Convention addresses radiological devices, as well as nuclear devices, and thereby effectively supplements the 1987 Convention on the Physical Protection of Nuclear Materials. In light of increasing information and intelligence relating to terrorist interest in the development of non-conventional weapons of mass destruction, the coverage of the

Terrorist Bombings Convention as it pertains to biological, chemical and radiological weapons is particularly important.

The nature of the offenses covered by the Terrorism Financing Convention also bears special mention. The Department of Justice has committed significant efforts to combating the financing and support of terrorist acts. We have worked within the law enforcement community domestically, as well as within such international fora as the Group of Eight, the Financial Action Task Force, the Organization of American States and others, to establish investigative and financial mechanisms to aid in the detection and rooting out of financial crime, including improvements to bank regulations and record-retention that will facilitate international efforts to eliminate terrorist financing and support. We are gratified that, through the Terrorism Financing Convention, the international community at large recognizes the vital importance of choking the financial lifeline of terrorists. This instrument also embodies the important recognition that the financiers of terrorist acts, including those who provide assets of any kind, are as reprehensible as those who commit the terrorist acts themselves, and treats them as seriously.

The Terrorism Financing Convention requires States Parties to implement penal legislation to address terrorist financing and other support. Such domestic laws do not currently exist in many countries. The definition of the offenses covered by Article 2 is formulated expansively to capture both the direct and indirect collection and provision of financing and other support. The offenses include financing that is provided in full or in part for terrorist acts. In addition, the Convention includes a broad definition relating to the meaning of financing and embraces "assets of every kind, whether tangible or intangible" and "legal documents or instruments in any form." Considering the many ways to provide financial support to terrorists, and the misuse of charitable institutions in particular in such financing, these provisions have particular importance.

\* \* \* \*

There are provisions common to both Conventions that represent advances in establishing international cooperative measures in the terrorism area. For example, the Terrorist Bombings

Convention is the first terrorism treaty expressly to preclude States Parties or individuals from resisting an extradition or mutual legal assistance request by claiming that the offense was connected with a political offence or inspired by political motives. Considering the political rationales that are often claimed as the motivation for terrorist acts, this provision represents an important recognition on the part of the international community that no justification exists for such heinous acts as the bombing of public places. This important provision is carried through in the Terrorism Financing Convention.

\* \* \* \*

The Terrorism Financing Convention also includes several unique and important provisions designed to address the complexities inherent in investigations and prosecutions relating to terrorist financing. Article 5, for example, addresses corporate liability. It requires States Parties to take necessary measures to enable a legal entity located in its territory or organized under its laws to be held liable (through criminal, civil or administrative measures) when a person responsible for the management or control of that legal entity has, in that capacity, committed the offense of terrorism financing. This provision recognizes that corporate entities, particularly financial and charitable institutions, are often knowingly exploited to finance or aid in the financing of terrorist groups.

\* \* \* \*

**d. Litigation concerning designation of Foreign Terrorist Organizations**

On June 8, 2001, the U.S. Court of Appeals for the District of Columbia Circuit issued an opinion in *National Council of Resistance of Iran v. Department of State*, 251 F.3d 192 (D.C. Cir. 2001), a case involving challenges by the People's Mojahedin of Iran ("MEK") and the National Council of Resistance of Iran ("NTCI") to their 1999 re-designations as Foreign Terrorist Organizations by the Secretary of State under the Antiterrorism and Effective Death Penalty Act of 1996. Pub.L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996). The

court held that the groups were entitled to limited due process rights because the NCRI (which was designated as an alias of the MEK) maintained an office in Washington, D.C. and had certain additional contacts with the U.S. The court ordered the Secretary to provide the groups with an opportunity to review the unclassified record and submit written materials to the Secretary for his consideration as part of the re-designation process. The United States filed a Petition for Panel Rehearing on July 23, 2001, as explained in the Petition, for the limited purpose of seeking modification of the court's opinion

to make clear that, when the Secretary of State first designates a new foreign terrorist organization, due process does not in this category of cases require advance notice and an opportunity for a pre-designation hearing for such an entity because otherwise targeted entities will have warning and can defeat much of the purpose of the designation. In such circumstances involving new designations, the type of post-designation hearing described in the court's opinion is all that is constitutionally required.

The excerpts below from the U.S. Petition provide a summary of the previous litigation and the United States reasons for seeking the modification. The U.S. petition was denied without opinion.

The full text is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## REASONS FOR MODIFYING THE COURT'S OPINION

1. This case involves challenges by petitioners People's Mojahedin of Iran ("People's Mojahedin") and the National Council of Resistance of Iran ("NCRI") to designations by the Secretary of State under the Antiterrorism and Effective Death Penalty Act of 1996 ("Antiterrorism Act" or "AEDPA") (Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996)). In 1999, the Secretary reded-

ignated the People's Mojahedin as a foreign terrorist organization under the statutory scheme, and designated the NCRI for the first time as an alias of the People's Mojahedin. 64 Fed. Reg. 55,112 (1999).

Petitioners contended before this Court that the Secretary's designations were factually and legally unfounded, and that the Secretary had no authority to list the NCRI as an alias of the People's Mojahedin. They also contended that the designations violated the Due Process Clause because petitioners were entitled to an administrative hearing prior to designation. Further, petitioners claimed entitlement to full access to the classified information on which the Secretary premised the designations.

Based on this Court's prior decision in *People's Mojahedin Organization of Iran v. Department of State*, 182 F.3d 17 (D.C. Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000), we responded that petitioners were not constitutionally present in the United States and thus not entitled to claim the protections of the Due Process Clause. Alternatively, we contended that, even if petitioners were present in this country in some sense, they were not protected by the United States Constitution since foreign states are not so protected, and foreign political organizations such as the People's Mojahedin and the NCRI have a similar constitutional status. We also pointed out that petitioners have no right of access to classified information, and that there was ample information in the record to demonstrate the reasonableness of the Secretary's designations.

2. In response to these arguments, this Court first reaffirmed the limited nature of its judicial review function under the Antiterrorism Act. (The Court's opinion is now published at 251 F.3d 192.) The Court then held that the Secretary's designation of the NCRI as an alias of the People's Mojahedin has substantial support in the record, and that the designation is neither arbitrary, capricious, nor contrary to law. 251 F.3d at 199. Next, the Court agreed with our position that the Secretary is authorized under the statute to designate aliases for foreign terrorist organizations. *Id.* at 200.

The Court then agreed that the People's Mojahedin does not, under its own name, have a presence in the United States. The Court nevertheless found that the record, including its classified

portions, reveals that the NCRI “can rightly lay claim to having come within the territory of the United States and developed substantial connections with this country.” 251 F.3d at 202. Accordingly, the Court concluded that petitioners are covered by the United States Constitution. *Id.* at 203. In addition, the Court found that petitioners had made a colorable allegation that they have an interest in a bank account in the United States, and that they therefore had a property interest protected by the Due Process Clause that would be impaired by the designation and its statutory consequences. *Id.* at 204.

The next part of the Court’s opinion contains the only aspect for which we seek rehearing. The Court explained that due process is a highly flexible concept, and it reiterated its ruling in *Palestine Information Office v. Shultz*, 853 F.2d 932 (D.C. Cir. 1988), that no hearing was required before the Secretary of State could direct the closing of a Washington, D.C. office that the Secretary deemed a mission of a non-governmental foreign entity. However, the Court found that we had not yet shown how affording whatever process is due before designating an entity as a foreign terrorist organization “would interfere with the Secretary’s duty to carry out foreign policy.” 251 F.3d at 208. The Court further explained that it was not immediately apparent how providing advance notice of a possible coming designation as a foreign terrorist organization would impair foreign policy goals. *Ibid.*

The Court noted that giving advance notice to groups not previously designated “might work harm to this country’s foreign policy goals” in ways that the Court would not immediately perceive, and that it therefore did not mean to “foreclose the possibility of the Secretary, in an appropriate case, demonstrating the necessity of withholding all notice and all opportunity to present evidence until the designation is already made.” *Ibid.* The Court found that no such showing had yet been made in this specific case. The Court concluded: “We therefore hold that the Secretary must afford the limited due process available to the putative foreign terrorist organization prior to the deprivation worked by designating that entity as such with its attendant consequences, unless he can make a showing of particularized need.” *Ibid.*

The Court then ruled that foreign groups constitutionally present in the United States and facing deprivation of protected prop-



erty interests are entitled to notice of a possible impending designation, disclosure of the unclassified portions of the administrative record, and an opportunity to present in writing evidence to rebut the proposition that they are foreign terrorist organizations. *Id.* at 208–09. The Court reiterated that “[u]pon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States.” *Id.* at 208.

In addition to ordering that petitioners here receive a post-designation opportunity to file responses to the non-classified information in the record and to support their claim that they are not terrorist organizations, the Court stated that “[w]hile not within our current order, we expect that the Secretary will afford due process rights to these and other similarly situated entities in the course of future designations.” *Id.* at 209.

3. Limited rehearing to modify the Court’s opinion is warranted because, given the significant national security interests at stake and the consequences of advance warning, due process should not require the Executive to give prior notice that an entity is being considered for a new designation as a foreign terrorist organization. Thus, rather than requiring the Secretary to make a finding in each individual case involving a designation, the Court should recognize that advance warning of an impending new designation should never be mandated.

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). The Supreme Court “has recognized, on many occasions, that where [the Government] must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause.” *Gilbert v. Homar*, 520 U.S. 924, 930 (1997); accord *FDIC v. Mallen*, 486 U.S. 230, 240–41 (1988).

The Supreme Court has thus held that the Government can seize a yacht believed to be subject to civil forfeiture without prior notice or a hearing, because the yacht was the “sort [of property] that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given.” *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). And, the Court ruled that no pre-seizure hearing is required when

United States customs officials seize an automobile at the border. *United States v. Von Neumann*, 474 U.S. 242, 251 (1986). See also *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908) (allowing seizure without a prior hearing of food believed to be adulterated).

Further, the Supreme Court has upheld warrantless searches and seizures of automobiles against Fourth Amendment challenges because “of the need to seize readily movable contraband before it is spirited away \* \* \*.” *Florida v. White*, 526 U.S. 559, 565 (1999). The Court has focused on “the special considerations recognized in the context of movable items \* \* \*.” *Ibid.* Accord *Pennsylvania v. Labron*, 518 U.S. 938 (1996).

The court distinguished these various cases when it held that advance notice is required before real property can be seized in *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993). The Court made clear that its earlier rulings were different because of the easy mobility of the items at issue. *Id.* at 53–61.

As we discuss below, the concerns motivating the Court in the cases finding no requirement of advance notice are obviously present here too. In the financial services world of today, funds can be moved easily and quickly by an entity acting speedily to frustrate a looming government order freezing assets.

4. As the Court is aware, in the Antiterrorism Act, Congress sought to “strictly prohibit terrorist fundraising in the United States,” and to make clear that this country is not to “be used as a staging ground” for terrorist activities. H.R. Rep. No. 104–383 (1995), at 43; see also Antiterrorism Act, § 301(a)(7), 110 Stat. 1247.

Accordingly, once the Secretary, pursuant to statutory standards, designates an entity as a “foreign terrorist organization,” Congress imposed three legal consequences that flow automatically: (a) blocking of the organization’s funds in the United States (18 U.S.C. § 2339B(a)(2)); (b) exclusion of its representatives and certain members from this country (8 U.S.C. § 1182); and (c) a prohibition on the “knowing” provision by persons within the United States or subject to its jurisdiction of “material support or resources” to the organization (18 U.S.C. § 2339B(a)(1)).

If advance notice of a possible new designation is given, the entity at issue would always be able to move some or all of its

funds out of the United States, or to conceal them before the designation actually occurs. They will then be available for terrorist purposes, or to free other funds for terrorism. See AEDPA, §§ 301(a)(6), (7), 110 Stat. 1247; H.R. Rep. No. 104-383, at 45, 81 (noting fungibility of money and how terrorist entities can shift funds from legitimate purposes to terrorist ones). Accord *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir.) (“money is fungible; giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts”), *cert. denied*, 121 S. Ct. 1226 (2000). Yet, preventing access to such assets is precisely one of the cardinal purposes of the Antiterrorism Act, as it imposes an automatic freeze on funds as soon as a designation happens.

Thus, if the Executive is required to give advance notice of a possible new designation, a key goal of the Antiterrorism Act will be thwarted as the group’s funds in the United States can be moved or hidden before the freeze is actually imposed. In addition, the entity at issue can take other actions in a speedy way—e.g., moving key personnel into the United States, or quickly collecting pledges of money and material—that will no longer be legal when the designation occurs.

Moreover, there is little the United States Government could do to stop the movement or concealment of assets before the Secretary provides Congress with the statutory seven-day classified notice of an impending designation. In most instances, prior to the notice to Congress, we will have little or no information about assets such as bank accounts held by the target organizations in the United States; the Government has no power or mechanism to poll all of the financial institutions in this country, searching for assets of entities that might later be designated as terrorist. Rather, it is only when the Secretary of State gives notice to Congress of a planned designation, that the Secretary of the Treasury is authorized to require “United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets until further directive \* \* \*.” 8 U.S.C. § 1189(a)(2)(C).

Thus, the Government often cannot even attempt to take steps to prevent the removal of assets by terrorist organizations in

advance of this time because we normally do not know what and where such assets are in this country.

5. At the same time, the strength of the Government's interest at stake here should be decisive with regard to the due process balancing. "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig v. Agee*, 453 U.S. 280, 307 (1981) (quoting *Aptheker v. Secretary of State*, 378 U.S. 500, 509 (1964)). Moreover, "the government has a legitimate interest in preventing the spread of international terrorism, and there is no doubt that interest is substantial." *Humanitarian Law Project*, 205 F.3d at 1135.

Here, where Congress has specifically authorized the Executive Branch to act in an area of foreign policy, the Government's authority is greatest and its interest is paramount. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981), cited in *Palestine Information Office*, 853 F.2d at 934. As the panel here recognized, this Court earlier concluded in *Palestine Information Office*, 853 F.2d at 942–43, that a post-deprivation remedy was constitutionally adequate when the Government ordered the closure of a Washington, D.C. office believed to constitute a foreign mission of the Palestine Liberation Organization, in order to coerce the PLO into changing its terrorist policies: "a post-deprivation opportunity to challenge th[e] deprivation may be all the process that is due. \* \* \* The Supreme Court has long recognized and deferred to the need of the executive branch to act speedily and authoritatively in the realm of foreign affairs." *Ibid.*

In sum, advance notice to an entity believed by the Secretary to be a foreign terrorist organization will undermine the national security interests of the United States and its foreign policy goals, as the entity will then have the warning necessary to take steps to remove or hide assets, or to take other actions that will shortly be forbidden once a designation becomes effective. The problem posed is a substantial and categorical one, and applies whenever new designations are being made.

Accordingly, while the Secretary could, because of this serious problem, justify in each new designation a decision not to provide advance warning to the targeted organization, the universality of this concern and the national security issues at stake should mean that the Constitution would never mandate that the

Secretary provide such prior notice. The opinion here should therefore be modified to make clear that, just as the Government need not give prior notice before seizing mobile items such as cars and yachts, it need not tell entities in advance that their funds in the United States might shortly be subject to blocking, that their representatives will be barred from the United States, and that they will be prohibited from gathering material support from U.S. persons.

We emphasize that our concerns ordinarily would not apply to organizations subject to redesignation. Any funds of such organizations in the United States are already frozen, material support to them is already prohibited, and their representatives are already barred from entering the country. Consequently, we do not seek any modification of the Court's opinion with regard to redesignations.

But with respect to any new designation, the Court should modify its opinion to make clear that in that category of cases the United States need not give advance notice. Rather, it is consistent with due process in all such situations for the United States to provide an opportunity for a prompt post-designation hearing and access to the unclassified material in the administrative record for entities that are similarly situated to the People's Mojahedin (*i.e.*, are constitutionally present in the United States and are facing deprivation of protected property interests). At the very least, the Court should modify its opinion so as not to rule out that categorical option.

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#### **e. Human rights and terrorism**

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted in 6.B.2.b., the United States on April 23, 2001, explained its vote against Resolution 2001/37, Human Rights and Terrorism, as follows:

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Recent events have shown that terrorism continues to pose clear and present danger to the international community. The attack on the U.S.S. Cole and the rash of terrorist attacks around the world are only the latest in a series of events that demonstrate

clearly that terrorists have no respect for human life. The United States has a strong and abiding commitment to combating terrorism, which includes cooperating with the appropriate mechanisms established by the international community.

We regret, therefore, that we are obliged to vote against this resolution. Our reason is that the sponsors have included language that grants terrorists and terrorist organizations a measure of legitimacy by equating their conduct with that of states. We believe that the basic function of the Commission is to set human rights standards that are binding upon states and to review states' compliance with those standards. Terrorists are not state actors, but criminals who bear individual criminal responsibility for their actions. The perpetuation of this unfortunate confusion adds nothing to the ability, or the obligation, of member states to cooperate in the effort to combat terrorism.

For this reason, the United States believes that the subject of terrorism is best addressed in other fora, such as the Sixth Committee of the U.N. General Assembly.

## **2. Genocide, War Crimes and Crimes Against Humanity**

### ***Resolution on Genocide***

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted in 6.B.2.b., the United States on April 25, 2001, explained its position on Resolution 2001/66, Genocide, as follows:

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The United States joins consensus on the resolution on prevention and punishment of the crime of genocide.

The United States has ratified the Convention on the Punishment of the Crime of Genocide and is committed to the principle of individual criminal responsibility, and the responsibility of states to end impunity and to prosecute those responsible for genocide.

However, the United States has fundamental concerns about the International Criminal Court Treaty.

The United States will not block consensus on the adoption of this resolution, but wishes to make clear its serious concerns with regard to the International Criminal Court Treaty.

The United States does not agree with Preambular paragraph 7 of the resolution [noting “the significance of the adoption” of the International Criminal Court Treaty]. In addition, we note that our country is not a signatory to the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968, referred to in Preambular paragraph 8. We thus disagree with that paragraph as well.

### **3. Narcotrafficking**

#### ***a. International Narcotics Control Strategy Report***

On March 1, 2001, the Department of State released the fifteenth annual International Narcotics Control Strategy Report pursuant to § 489 of the Foreign Assistance Act of 1961, as amended (“FAA”). The Report addresses the performance of each country in combating narcotrafficking and money laundering both on its own and in cooperation with the United States and other countries as well as other specific narcotics-related reporting requirements set forth in §§ 481(d)(2) and 484(c) of the FAA and § 804 of the Narcotics Control Trade Act of 1974, as amended. The Report provides the factual basis for the Presidential narcotics certification determinations for major illicit drug producing or drug-transit countries required under § 490 of the FAA, discussed in b. below.

A fact sheet and full text of the report are available at [www.state.gov/g/inl/rls/nrcrpt/2001/](http://www.state.gov/g/inl/rls/nrcrpt/2001/).

#### ***b. Certification of major illicit drug-producing and drug-transit countries***

Under § 490(e) of the FAA, most United States assistance must be withheld and the United States must vote against loans by multilateral development banks to countries identified (in November of the preceding year) under § 490(h) as major illicit drug producing and drug-transit countries unless the President makes certain determinations and cer-

tifications to Congress by March 1 of a given year, as authorized by § 490(b). Countries certified as having cooperated fully with the United States, or having taken adequate steps on their own, to achieve full compliance with the goals and objectives of the 1988 UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances are thereby exempt from the sanctions.

On March 1, 2001 the following countries were so certified: The Bahamas, Bolivia, Brazil, People's Republic of China, Colombia, Dominican Republic, Ecuador, Guatemala, India, Jamaica, Laos, Mexico, Nigeria, Pakistan, Panama, Paraguay, Peru, Thailand, Venezuela, and Vietnam. Presidential Determination No. 2001-12, 66 Fed. Reg. 14454 (Mar. 12, 2001). Also on March 1 Cambodia and Haiti were determined not to qualify for "full" certification, but the President determined and certified that the vital national interests of the United States required that sanctions not be imposed on them. Afghanistan and Burma were denied certification and were thus subject to all sanctions under § 490. *Id.*

On November 1, 2001, the President transmitted to Congress his annual determination of major illicit drug producing or major drug-transit countries, in accordance with § 490(h). 37 WEEKLY COMP. PRES. DOC. 1584 (Nov. 5, 2001). Countries on this list will require determinations and certifications by the President by March 1, 2002 to avoid imposition of sanctions. The one change in the list from that announced November 1, 2000, was the removal of Cambodia, explained in the President's letter as follows:

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I have removed Cambodia from the Majors List. Cambodia was added to the Majors List in 1996 as a transit country for heroin destined for the United States. In recent years, there has been no evidence of any heroin transiting Cambodia coming to the United States. On the basis of this cumulative evidence, I have determined that Cambodia no longer meets the standard for a major drug-transit country and I have removed Cambodia from the



Majors List. I will, however, keep it under observation as a country of concern.

***c. Role of U.S. intelligence in aircraft interdiction***

On July 26, 2001, the United States issued a report of a joint investigative team comprised of representatives from the U.S. and Peruvian Governments, entitled "Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident." As explained in the Report,

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On April 20, 2001, as part of a Peruvian-U.S. counternarcotics airbridge denial program (ABDP) a Peruvian Air Force (FAP) A-37 aircraft interceptor fired on a civilian floatplane carrying five U.S. citizens after mistaking its behavior for that of a narcotics trafficking aircraft. A U.S. aerial tracking aircraft initially detected the aircraft and provided the information used to follow and intercept the floatplane. Two U.S. citizens in the floatplane were killed during the interception. As a result of this accident, the United States and the Government of Peru (GOP) agreed to a joint investigation of the facts related to the interdiction of the aircraft, owned by the Aviation Company of the Association of Baptists for World Evangelism (ABWE), and make recommendations that would help avoid such a tragedy in the future.

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The excerpts below set forth the Charter of the Joint U.S.-Peru Investigative Team and the history of the Peruvian Airbridge Denial Program, including the statutory basis for U.S. intelligence support, and the conclusions of the Joint Investigative Committee on the accident of April 20, 2001. (Footnotes, which refer to exhibit numbers, have been deleted.)

The full texts of the Report and an on-the-record briefing by Rand Beers, Assistant Secretary for International Narcotics and Law Enforcement Affairs and Chairman of the U.S. Investigative Committee are available at [www.state.gov/g/inl/rls/rpt/pir](http://www.state.gov/g/inl/rls/rpt/pir).

## INVESTIGATIVE CHARTER AND METHODOLOGY

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American Investigative Team. For the United States, an inter-agency team comprised of representatives from the U.S. Departments of State and Defense, the U.S. Interdiction Coordinator, and the Central Intelligence Agency was formed on April 27. The White House designated the State Department's Assistant Secretary of State for International Narcotics and Law Enforcement Affairs (INL), Rand Beers, as the team leader.

Peruvian Investigative Team. For the Government of Peru, the ministries of Foreign Affairs and Defense formed an investigation team the week of April 22. The GOP designated Peruvian Air Force Major General Jorge Kisic Wagner, Commander of Operations, as the team leader.

### Charter of the Joint Investigative Team

- Establish the facts and circumstances, including systemic or procedural matters, that contributed to the April 20 interdiction of the U.S. missionary floatplane, and the death of two U.S. citizens.
- Make recommendations, if any, to the appropriate U.S. and GOP authorities as to the modifications that might be required to minimize a possible repetition of this incident.
- The team was not authorized to:
  - make a recommendation or determination with regard to the suspension or start-up of counternarcotics aerial intercept operations in Peru;
  - question witnesses under oath or receive sworn testimony; or
  - examine misconduct or fix blame.

\* \* \* \*

## HISTORY OF THE PERUVIAN AIRBRIDGE DENIAL PROGRAM

Aerial Drug Flow. Narcotics traffickers have traditionally favored air transportation of drugs and drug money within the Andean

region, due to the speed and ability to access outlying areas far from government control and/or serviceable roads or rivers. In the case of Peru, an aerial transportation route, or "airbridge" between the coca-cultivating areas of Peru and the cocaine refining areas of Colombia, developed in the late 1980's as a major means to move semi-refined cocaine to Colombia, with return flights bringing drug dollars back to Peruvian traffickers and coca-cultivating communities. At the height of this airbridge in 1994, the U.S. detected over 428 international narcotics flights leaving Peru with an estimated 310 metric tons of semi-refined cocaine. The estimated average per flight load in 1994 was 727 kilograms. Drawing on its own sources of information, the Peruvian Air Force (FAP) placed the average number of international trafficking aircraft even higher, at 270 flights per month, with each flight carrying 500 kilograms.

**Airbridge Results.** Since March 1995, the FAP has shot or forced down more than 38 trafficking aircraft and seized more than a dozen on the ground. There are no statistics on the hundreds of aircraft annually checked and released by both the police and FAP as a matter of routine. In recent years, the deterrent effect of the airbridge denial program has been evident as the pace of interceptions has slowed down and traffickers have sought alternative routes to move drugs. In addition, the total amount of coca cultivation in Peru has fallen dramatically since 1995, from 115,300 hectares to 34,100 hectares in 2000, as a direct result of the interdiction of the airbridge. That said, air transportation of drugs remains one of the preferred methods of transportation of large cash and drug shipments. In the past year and a half, a trafficking aircraft was intercepted and shutdown on July 17, 2000, and there were two forcedowns of trafficking aircraft, one on December 18, 2000 and one on January 21, 2001.

**U.S. Aerial Tracking.** The U.S. began consistent aerial monitoring of the Peru-Colombia airbridge in 1990, under the U.S. Southern Command program "Support Justice." The objective of the program was to use U.S. aerial tracking aircraft, such as AWACs and P-3s, to confirm anecdotal law enforcement information regarding the frequent use of small private aircraft to quickly move the majority of cocaine products within the Andean region. Support Justice provided objective data on the non-commercial

routes being used by trafficking aircraft, the flight times, departure points and final destinations. This information was passed to the appropriate Peruvian civilian and military officials in the Peruvian government, in order to make them aware of the problem and to initiate bilateral discussions on how these flights could be stopped. Beginning in 1998, U.S. aerial tracking sorties over Peru were reduced, as demand grew for these assets in other parts of the world, and the flow of narcotics trafficking aircraft over Peruvian territory appeared to lessen.

**Bilateral Framework Document.** In May 1991, the U.S. and Peru signed a bilateral counternarcotics framework document that set the policy stage for all aspects of counternarcotics cooperation, but also included a reference to cooperation against aerial trafficking. Section B.13 stated in part “. . . the GOP [Government of Peru] shall propose policies designed to remove incentives for drug trafficking. The GOP may also set policies for coordination among the Peruvian National Police, the Army, the Navy and the Air Force so as to achieve prompt results in matters related to security, controls, interceptions and required seizures.”

The Peruvian implementation of the air interdiction portion of the 1991 document was initially achieved by interdicting flights at the point of departure or arrival on the ground within Peru. These counternarcotics efforts consisted of pre-positioning law enforcement units at clandestine airstrips to catch traffickers loading or unloading aircraft on the ground; destroying trafficker airstrips with explosives; and intensifying passenger and cargo searches of Peruvian aircraft.

**FAP Counternarcotics Efforts.** In 1992, Peruvian Decree Law Number 25426 was passed, which directed the FAP to take control of all airports and airfields in the Huallaga Valley and other areas associated with drug trafficking. In the Huallaga Valley alone, the FAP had established 16 “aeronautical control bodies” at airports and airfields. These FAP units reviewed flight plans, enforced evening flying curfews, and monitored point-to-point flying times for domestic aircraft, to ensure that there were no interim landings for illicit drug activities. The decree law also contemplated the use of arms against narcotics trafficking civil aircraft under very restricted conditions and in conformity with Peruvian Civil Aeronautics Law Number 24882 and the interna-

tional procedures for interception established by the International Civil Aviation Organization (ICAO).

Beginning in 1993, the U.S. began passing real-time information on drug trafficking aircraft to the FAP so that aerial interceptions could be performed. The information was generated by U.S.-operated ground based radars and aerial tracking platforms located in and around coca cultivating regions.

In the 1994–95 time period, these aerial interceptions forced Peruvian coca leaf prices to drop precipitously from \$80.00 per 100 pounds to \$7.00 per 100 pounds in some areas, as drug-cultivating farmers were cut off from the aerial trafficking pipeline. About half of the trafficking aircraft intercepted by the FAP were seized or destroyed on the ground. The rest were shot down after exhausting international procedures for interception. Records show that from 1995 to the present, very few drug trafficking aircraft intercepted in Peruvian airspace complied with instructions to land, even after warning FAP aircraft fired shots. Up until the subject of this investigation however, there were no known cases of mistaken identity or innocent deaths.

**U.S. Suspension of Program.** U.S. intelligence support for the FAP airbridge intercept program was suspended in April 1994, after a legal review by the Department of Justice determined that U.S. intelligence support to implement Peruvian “use of force” policies against civilian trafficking aircraft could place U.S. and Peruvian officials at risk of committing a U.S. federal felony by aiding and abetting the destruction of: “a civil aircraft registered in a country other than the United States while such aircraft is in service or cause damage to such an aircraft which renders that aircraft incapable of flight or which is likely to endanger that aircraft’s safety in flight” (18 United States Code, Section 32(b)(2), which implements the 1971 Montreal Sabotage Convention).

**U.S. Renewal of Cooperation.** After several months of discussion with host governments and between agencies in Washington, both the U.S. Congress and President Clinton restored the sharing of information, due to the critical role that the program played in undermining the drug trafficking trade in Peru. Congress passed section 1012 of the National Authorization Act for FY 1995 (Public Law 103–337) which provided immunity for host nation employees and agents interdicting aircraft

and for U.S. employees and agents assisting foreign nations in the interdiction of aircraft when there is “reasonable suspicion” that the aircraft is primarily engaged in illicit drug trafficking. Section 1012 required that:

- (1) the aircraft is reasonably suspected to be primarily engaged in illicit drug trafficking; and
- (2) the President of the United States has determined that (a) interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that foreign country, and (b) the country has appropriate procedures in place to protect against innocent loss of life in the air or on the ground in connection with interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force directed against the aircraft.

On December 8, 1994, President Clinton issued Presidential Determination 95–9, in which he determined that Peru met [these] requirements. Specifically, it considered that:

The GOP has established rigorous procedures to ensure adequate protection against the loss of innocent life. The procedure for identifying and communicating with intercepted aircraft are based on ICAO guidelines, and are contained in classified GOP plans and orders, as well as in Civil Aviation law 24882.

Peruvian Law 824, dated April 24, 1996, specifically authorized FAP authorities to conduct counternarcotics-related intercepts. Law 824 reads in part under Article VII:

The Peruvian Air Force, in accordance with its normal mission, is authorized to intercept domestic and foreign aircraft flying over Peruvian airspace, in the coca zones, in order to establish the aircraft identification, point of origin, and final destination. If the intercepted aircraft refuses to provide the requested information or obey the instructions of FAP authorities, it is possible that appropriate interdiction measures can be considered, including shootdown.

Clear rules on engagement, which included measures designed to protect against the loss of innocent life, were established by the GOP in 1994, and were determined by the United States to be consistent with the requirements of U.S. law permitting assistance to foreign governments in aerial interdiction. After a collision between a U.S. tracking aircraft and a FAP intercept aircraft in February 1999, operational procedures and training became more focused on safety of flight, and references to the full range of engagement rules, contained in the 1994 procedures, became less detailed and explicit in implementing documents agreed to by representatives of both governments. U.S. and Peruvian personnel were trained jointly following these mutually defined and agreed upon procedures.

**Aerial Intercept Procedures.** Based on a review of operating procedures, training slides, witness interviews, and site visits the investigating team established what were the existing aerial intercept procedures. In general terms, an interception begins with information. Information on a flight can come from a variety of sources including DOD [U.S. Department of Defense], DEA [U.S. Drug Enforcement Administration], the Peruvian military and elsewhere. In some cases, U.S. aircraft detect suspect flights while on patrol. The U.S. aircraft crew's mission in the intercept process is detecting and tracking suspect aircraft and guiding the FAP interceptor to the suspect aircraft. Once the FAP intercepts the target aircraft, the mission is under the control of a FAP officer host country rider (HCR) on board the U.S. tracking aircraft. The HCR, in turn, is under the direct command and control of a FAP commander on the ground. The HCR serves as the relay between the Peruvian command center and the Peruvian interceptor aircraft. The U.S. aircraft crew is not in the chain of command, and has no role in decisions regarding how intercepts are completed.

Mutually agreed upon procedures are followed when intercepting suspect aircraft. . . .

\* \* \* \*

## CONCLUSIONS

1. By the late 1990s, references to the full range of procedures, contained in the 1994 agreement on procedures, became

less detailed and explicit in implementing documents agreed to by representatives of both governments.

2. At the same time, joint training utilized an abbreviated set of procedures, with the assumption that the target had been identified as a narcotics trafficking aircraft prior to the arrival of the interceptors. Joint training was also very much focused on safety of flight, following a collision between surveillance and interceptor aircraft in February 1999.

3. Key participants involved in the April 20, 2001 incident narrowly viewed their respective command and control roles and did not individually consider their actions from a broader, overall perspective.

4. Despite its steady altitude and general flight path deeper into Peru, the characteristics of the flight of Peruvian civil aircraft OB-1408 on April 20, 2001 generated suspicion within the Peru-U.S. counternarcotics aircraft interdiction system that it was a narcotics trafficking aircraft.

5. The language limitations of Peruvian and American participants—particularly under stress—played a role in reducing the timely flow of information, and comprehension of decisive messages related to the April 20 interception of OB-1408.

6. Communications systems overload, and cumbersome procedures played a role in reducing timely and accurate compliance with all applicable directives by participants in the air and on the ground.

***d. Litigation concerning use of controlled substance for religious purposes***

The United States filed its Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment in *O Centro Espirita Beneficiente Unaio do Vegetal v. Reno*, No. CV 00-1647 (JP/RLP) on January 25, 2001 in the U.S. District Court for the District of New Mexico. Plaintiffs, Centro Espirita Beneficiente Unaio do Vegetal ("UDV") sought a preliminary injunction prohibiting the United States from enforcing the Controlled Substances Act ("CSA") banning the importation, possession, and distribution of the hallucinogen dimethyltryptamine ("DMT"), listed on Schedule I of the CSA, 21 U.S.C. §§ 952(a) and 841(a)(1). The injunction would also compel the government to return



quantities of DMT seized pursuant to a valid search warrant issued following its discovery by United States Customs inspectors. Plaintiffs claim they use the hallucinogen, in the form of a tea (“ayahuasca”) brewed from plants that naturally produce DMT, as a central part of their religion.

The United States argued that plaintiffs were not entitled to a preliminary injunction because, among other things, they had not met the burden of demonstrating a substantial likelihood of prevailing on the merits. The excerpts below provide the views of the United States on the importance of adhering to its obligations under the 1971 Convention on Psychotropic Substances; that prohibiting the UDV’s use of ayahuasca does not violate the Religious Freedom Restoration Act (RFRA), nor the First Amendment to the U.S. Constitution; that the differential treatment of peyote use by Native Americans and ayahuasca use by the UDV does not violate the equal protection clause of the U.S. Constitution; and that international law and treaties do not mandate an exemption from the CSA for the UDV’s religious use of ayahuasca. The Memorandum also argued that plaintiffs were in error in asserting that the CSA covers only DMT produced by chemical synthesis to the exclusion of that produced by extraction from plant material, as is used by plaintiffs. Internal citations to other headings in the case and internal cross-references have been omitted.

The full text of the Memorandum is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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## 1. The Government Has a Compelling Interest in Adhering to the 1971 Convention on Psychotropic Substances

A compelling governmental interest in prohibiting the UDV’s use of ayahuasca is the government’s interest in adhering to an important international treaty obligation. The treaty most directly implicated by the proposed exemption for ayahuasca (fn. omitted) is the 1971 Convention on Psychotropic Substances, a treaty to which the United States, Brazil, and over 150 other countries are

parties. *See* United Nations Convention on Psychotropic Substances, 1971, opened for signature February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175. Like the CSA, the Convention classifies substances into schedules according to the degree of safety and medical usefulness of those substances. The Convention lists dimethyltryptamine as a "Schedule I" substance. The primary significance of a Schedule I classification is the requirement that parties to the convention "[p]rohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them." Art. 7(a). The Convention also prohibits the import and export of Schedule I substances without both import and export authorizations. *See* art. 7(f) and 12(1)(a). Moreover, the Convention provides that "a preparation is subject to the same measures of control as the substance which it contains," art. 3, ¶ 1, with "preparation" defined in relevant part as "[a]ny solution or mixture, in whatever physical state, containing one or more psychotropic substances." Art. 1.

The drafters of the 1971 Convention specifically considered the issue of religious uses of Schedule I substances. As a result, the Convention contains a limited exception to the "scientific and medical use" restrictions of article 7. That exception is as follows:

A State on whose territory there are plants growing wild which contain psychotropic substances from among those in Schedule I and which are traditionally used by certain small, clearly determined groups in magical or religious rites, may, at the time of signature, ratification or accession, make reservations concerning these plants, in respect of the provisions of article 7, except for provisions relating to international trade.

Art. 32, ¶ 4. This is the only provision for religious use of Schedule I substances in the Convention. The drafters thus chose not to allow a broad exception for any religious use of Schedule I substances, but instead to limit religious use of Schedule I substances to one very specifically delineated circumstance. Under the limited religious use exception, the United States made a reservation for Native American religious use of peyote. *See* Dalton Decl. ¶ 8.

The United States could not have made a reservation for religious use of the plants used to make ayahuasca, if only because those plants do not grow wild in this country. While Brazil might have been able to make such a reservation, it did not do so. Even if it had, this would not have enabled the United States, which would still be subject to the restrictions of article 7, to import and allow the use of ayahuasca.

If the United States were to allow religious use of ayahuasca by the UDV, it would be in clear violation of the 1971 Convention. *See Dalton Decl.* ¶ 11. That the United States intended its laws and practices in all cases to conform to the Convention is clear, not only from its signing of the Convention, but from implementing legislation. In anticipation of ratifying the Convention, Congress amended the CSA by the Psychotropic Substances Act of 1978 with the intent that the Act, “together with existing law, will enable the United States to meet all of its obligations under the Convention and that no further legislation will be necessary for that purpose.” 21 U.S.C. § 801a(2). Indeed, under the CSA, the only exception to the requirement that Congress make specified findings before scheduling a substance is if an international treaty requires the substance to be on a particular schedule. *See* 21 U.S.C. § 812(b). Congress thus evinced its intent that the United States comply with the terms of the Convention even where the Convention contemplated an outcome that Congress might not reach on its own.

The United States has a fundamental interest in the observance of its treaty obligations. *See, e.g., Gibson v. Babbitt*, 223 F.3d 1256 (11th Cir. 2000) (rejecting a RFRA challenge on the grounds that the government “has a compelling interest in fulfilling its treaty obligations with federally recognized Indian tribes”). The foundation of treaty law is the long-established principle of *pacta sunt servanda* (“agreements must be observed”). *See Dalton Decl.* ¶ 10. This principle is expressed in article 26 of the Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, T.S. No. 58 (1980), 1155 U.N.T.S. 331, which the United States considers as expressing customary international law on this point. *See Dalton Decl.* ¶ 10. Article 26 provides: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.” The United States thus

has a legal duty, as a matter of international law, to perform its treaty obligations.

That interest is particularly compelling where, as here, the treaty in question is vital to one of the government's most important interests. The 1971 Convention is a cornerstone of the government's ongoing effort to combat illicit international drug trafficking into the United States. *See* Sheridan Decl. ¶¶ 4–5. The United States relies on the treaty to secure the cooperative efforts of other countries, particularly those countries that do not have comprehensive drug laws of their own. *See id.* In recognition of the treaty's importance, the United States engages in diplomatic efforts to encourage compliance with the Convention by other countries. *See* Dalton Decl. ¶ 13. A failure by the United States to comply faithfully with the treaty would necessarily detract from its ability to influence other countries to comply. *See id.* ¶10. It would also entail serious diplomatic repercussions, and could conceivably lead to other countries becoming less willing to enter into international agreements with the United States. *See id.* ¶ 12.

Defendants note that this is not an issue of whether the 1971 Convention “trumps” RFRA or vice versa. To be sure, a later-enacted statute may override an inconsistent treaty obligation. Nonetheless, courts are loath to construe a subsequently enacted statute as abrogating a treaty obligation unless compelled to do so by statutory language. *See Cook v. United States*, 288 U.S. 102, 120 (1933) (“A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed.”); *see also United States v. Dion*, 476 U.S. 734, 739–40 (1986) (“[W]hat is essential is clear evidence that Congress actually considered the conflict between its intended action on the one hand and the [treaty] on the other, and chose to resolve that conflict by abrogating the treaty.”); *Trans World Airlines, Inc. v. Franklin Mint Corp. et al.*, 466 U.S. 243, 253 (1983) (holding that, in the absence of any mention of the treaty in the legislative history or text of the later-enacted statute, “we are unwilling to impute to the political branches an intent to abrogate a treaty without following appropriate procedures set out in the Convention itself”).

Moreover, a later-enacted statute abrogates a preexisting treaty obligation only if there is an irresolvable conflict between the two. It is incumbent upon this Court to read RFRA so that there is no

such conflict. See, e.g., *Vimar Seguros y Reasegueros v. M/V Sky Reefer*, 515 U.S. 528, 539 (1995) (“If the United States is to be able to gain the benefits of international accords and have a role as a trusted partner in multilateral endeavors, its courts should be most cautious before interpreting its domestic legislation in such a manner as to violate international agreements.”); *Warren Corp. v. Environmental Protection Agency*, 159 F.3d 616 (D.C. Cir. 1998) (noting “the Supreme Court’s instruction to avoid an interpretation that would put a law of the United States into conflict with a treaty obligation of the United States”); *Restatement (Third) of Foreign Relations Law* § 114 (“Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States.”). In this case, there is no conflict between RFRA and the 1971 Convention so long as adherence to the 1971 Convention is viewed as a compelling governmental interest. This reading is not only “fairly possible”; it is, as the government has argued above, the correct one.

## 2. The Government Has a Compelling Health and Safety Interest in Prohibiting the UDV’s Use of Ayahuasca

The Supreme Court has observed that drug abuse is “one of the greatest problems affecting the health and welfare of our population,” and therefore “one of the most serious problems confronting our society today.” *Treasury Employees v. Von Raab*, 489 U.S. 656, 668, 674 (1989). The Controlled Substances Act is Congress’s response to this great and serious problem. The depth of Congress’s concern regarding the use of controlled substances is reflected in all aspects of the Controlled Substances Act.

The language of the Act begins with Congress’s finding that “[t]he illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.” 21 U.S.C. § 801(2). The legislative history underscores Congress’s conclusion that “[d]rug abuse in the United States is a problem of ever-increasing concern, and appears to be approaching epidemic proportions.” H.R. Rep. No. 91-1444, 91st Cong., 2d Sess., *reprinted in* U.S.C.C.A.N. 4566. . . .

While thus identifying all controlled substances as a matter of high concern, Congress recognized that some controlled substances were of more concern than others. Accordingly, Congress classified controlled substances under five separate schedules according to their potential for abuse, current medical use, and safety. *See* 21 U.S.C. § 812. Congress made clear that “a drug or other substance *may not* be placed in any schedule unless the findings required for such schedule are made with respect to such drug or other substance.” 21 U.S.C. § 812(b) (emphasis added).

The schedule subject to the highest level of control and the severest penalties for violation is Schedule I. The findings that must be made in order for a substance to be placed on Schedule I are as follows: “(A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.” 21 U.S.C. § 812(b)(1). The governmental interests in prohibiting the possession and distribution of a Schedule I substance “are of the highest order,” because use of these substances “poses a substantial threat to public health, safety, and welfare.” *United States v. Warner*, 595 F. Supp. 595, 598 (D. North Dakota 1984) (discussing peyote). The government has a clearly compelling interest in prohibiting the possession and distribution of controlled substances that have a high potential for abuse and that lack any safe medical application. *See Employment Division, Dep’t of Human Resources v. Smith*, 494 U.S. 872, 904 (1990) (O’Connor, J., concurring) (“In light of our recent decisions holding that the governmental interests in the collection of income tax, a comprehensive Social Security system, and military conscription are compelling, respondents do not seriously dispute that [the government] has a compelling interest in prohibiting the possession of [a Schedule I substance] by its citizens.”) (internal citations omitted); *see also Warner*, 595 F. Supp. at 599 (“Courts have recognized that Congress has a compelling interest in controlling the use of drugs that it determines to be dangerous.”).

Since the effective date of the Controlled Substances Act (May 1, 1971), DMT has been listed as a Schedule I substance. . . . Moreover, Congress made clear that its concern about Schedule

I substances, including DMT, extended to “any material, compound, mixture, or preparation containing” those substances. 21 U.S.C. § 812 Schedule I(c). Congress’s assessment of DMT’s lack of safety is thus equally applicable to ayahuasca as a material, compound, mixture, or preparation containing DMT. . . .

\* \* \* \*

. . . Plaintiffs have presented no evidence that even purports to establish the safety of ayahuasca with any degree of scientific certainty. On the other hand, Congress has made an affirmative statutory declaration that materials containing DMT—materials such as ayahuasca—are unsafe. In addition, it is known that substances chemically related to ayahuasca’s components can have serious adverse effects on mental health, and that ayahuasca contains a substance that can have fatal interactions with several common foods and medicines. The available evidence thus demonstrates a compelling health and safety interest in prohibiting the use of ayahuasca.

\* \* \* \*

#### **4. The Prohibition on Ayahuasca is the Least Restrictive Means of Furthering the Government’s Compelling Interests**

\* \* \* \*

The government’s compelling interest in adhering to the 1971 Convention on Psychotropic Substances can be accomplished through no other means than those specified by the treaty, namely, a total prohibition on the import and use of all preparations containing DMT other than for limited medical and scientific purposes. *See* 1971 Convention art. 7. The Convention contains a section that allows signatories to seek amendments to the treaty. *See id.* art. 30. However, it could easily take ten years to implement an amendment to a treaty of this kind, *see* Dalton Decl. ¶ 12, and there is no guarantee that the other signatories would approve the amendment. The head of the Department of State’s Treaty Affairs Office has opined that even seeking to amend such a widely-accepted and stable multilateral convention “would entail enormous diplomatic and political costs for any country seeking

such an amendment.” *Id.* Moreover, seeking to amend the treaty would undermine, albeit to a lesser degree, the same compelling interest that the government has in not violating the treaty: the interest in preventing a general “chipping away” at the protections of a treaty that has not been amended in the 25 years that it has been in force. *See id.* . . .

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**C. Prohibiting the UDV’s Use of Ayahuasca Does Not Violate the First Amendment**

Because the government has compelling interests in prohibiting the UDV’s use of ayahuasca that are being furthered by the least restrictive means, the prohibition on the UDV’s use of ayahuasca would survive heightened scrutiny under the First Amendment. However, the correct First Amendment analysis in this case is not one of heightened scrutiny. Under well-established First Amendment jurisprudence, a neutral, generally applicable law may be applied to religiously motivated conduct without compelling justification. *See Employment Division, Dep’t of Human Resources v. Smith*, 494 U.S. 872 (1990); *Thiry v. Carlson*, 78 F.3d 1491, 1496 (10th Cir. 1996). . . .

\* \* \* \*

**D. The Government’s Differential Treatment of Peyote Use By Native Americans and Ayahuasca Use By the UDV Does Not Violate the Equal Protection Clause**

Plaintiffs argue that the government’s differential treatment of peyote use by Native Americans and ayahuasca use by the UDV violates the Equal Protection Clause. Plaintiffs acknowledge that the Equal Protection Clause is implicated only if they can “make a threshold showing that they were treated differently from others who were similarly situated to them.” *Campbell v. Buckley*, 203 F.3d 738, 747 (10th Cir. 2000). They argue that “[t]he UDV is similarly situated to the [Native American Church] in all significant respects.”

Plaintiffs do not mention the most obvious difference between their situation and that of the Native Americans who use peyote: that Plaintiffs are seeking permission to use a different substance.



See *United States v. Rush*, 738 F.2d 497, 513 (1st Cir. 1984) (noting the fact that “[m]arijuana is not covered by the peyote exemption” as relevant to the equal protection claims of non-Indians seeking to use marijuana). Not all controlled substances present identical concerns. In *McBride v. Shawnee County, Kansas Court Servs.*, 71 F. Supp. 2d 1098 (D. Kansas 1999), Rastafarian Church members argued that their religious marijuana use rendered them similarly situated to Native American Church members. The court rejected this claim, noting:

[T]he religious exemption in question is for peyote[,] not marijuana. Although both drugs are classified as a schedule I controlled substance, peyote and marijuana are not the same drug, a point which is overlooked by petitioners. There are over one hundred types of controlled substances listed in schedule I, including heroin, codeine methyl bromide, and morphine methyl bromide. Not all drugs listed in schedule I pose the same threat to the individual or to society.

*McBride*, 71 F. Supp. at 1101 (internal citation omitted). . . .

Ayahuasca presents health concerns that are not present with peyote. . . . [T]he tea contains certain enzyme inhibitors known as MAOIs that may have a severe and potentially deadly interaction with certain common foods and prescription drugs. This is a significant health risk that is not present in the case of peyote. Ayahuasca also differs from peyote in that, while peyote grows in this country, the plants that comprise ayahuasca do not. As discussed above, while peyote is tightly controlled at its point of origin by Texas regulation, no such controls are in place for ayahuasca in Brazil. See Part I.B.3., *supra*. The potential for illegal trafficking into the substance abuse market is correspondingly greater for ayahuasca than for peyote.

Another crucial difference between Plaintiffs’ situation and that of Native American peyote users lies in the unique relationship between the federal government and Indian tribes. In *Morton v. Mancari*, 417 U.S. 535 (1974), the Supreme Court, in determining that employment preferences for Native Americans within the Bureau of Indian Affairs did not constitute racial discrimination, noted the import of this special relationship:

Resolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a “guardian-ward” status, to legislate on behalf of federally recognized Indian tribes. The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to “regulate Commerce . . . with the Indian tribes,” and thus, to this extent, singles out Indians as a proper subject for separate legislation.

*Morton*, 417 U.S. at 551–52. . . .

The United States’ unique obligation to Native Americans extends to the preservation of Native American culture. *See* 25 U.S.C. § 2901(1). . . .

. . . Congress has made clear that the peyote exemption as it stands today is grounded in Congress’s unique obligation to preserve the integrity of Native American tribal culture. . . . 42 U.S.C. § 1996 a9a). . .

Courts have upheld the peyote exemption against Equal Protection challenges by other religious groups on the grounds that the peyote exemption is rooted in the special obligations of the United States toward Native Americans. . . . *Rush*, 738 F.2d at 513. . . . Similarly, [the Fifth Circuit has held that] the government did not violate the Equal Protection Clause by allowing peyote use by the Native American Church but prohibiting peyote use by a non-Indian religious group (“Peyote Way”). . . . *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1216 (5th Cir. 1991). *See also McBride*, 71 F. Supp. at 1102 . . . *Warner*, 595 F. Supp. at 601 (D.N.D. 1984). . . .

The UDV is not similarly situated to Native American peyote users in one more important respect. . . . While the population of Indian tribal members eligible for the peyote exemption is undeniably much larger than the UDV, the peyote exemption is in one sense more narrow, in that the group in question—tribal Native American peyote users—is self-limiting. *See Rush*, 738 F.2d at 513 (noting that “[the peyote] exemption is properly viewed as a government effort toward accommodation for a *readily identifiable*,

narrow category which has minimal impact on the enforcement of the laws in question”) (emphasis added); *see also United States v. Lee*, 455 U.S. 252, 261 (1982). . . .

\* \* \* \*

#### E. International Law and Treaties Do Not Mandate an Exemption from the CSA for the UDV’s Religious Use of Ayahuasca

Plaintiffs cite “the international law doctrine of comity” as supporting an exemption for the UDV’s religious use of ayahuasca. Comity is “the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.” *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895). In this case, Plaintiffs argue, the doctrine of comity requires the United States to permit the UDV’s use of ayahuasca “because Brazil, the nation with by far the greatest experience with and knowledge of the UDV, permits the UDV’s religious use of Hoasca. . . .”

Plaintiffs’ argument is without merit. The doctrine of comity does not require the United States to excuse an action that violates federal law, or to alter that law so as to permit the action, on the grounds that the action would not violate another country’s law. Unlike domestic law, comity is not “a matter of absolute obligation,” *Hilton*, 159 U.S. at 163; it is a non-binding principle that will yield in all cases to clear domestic legislation. *See, e.g., Commodity Futures Trading Comm’n v. Nahas*, 738 F.2d 487, 495 (D.C. Cir. 1984) (“Federal courts must give effect to a valid, unambiguous congressional mandate, even if such effect would conflict with another nation’s laws or violate international law.”); *see also* Restatement (Third) of Foreign Relations Law § 115, comment a (“An act of Congress will . . . be given effect as domestic law in the face of . . . a preexisting rule of customary international law.”). Accordingly, where domestic legislation is involved, comity is most accurately viewed as a principle of statutory construction that becomes relevant only if a statutory provision is susceptible of more than one interpretation. . . . As discussed at length above, Congress’s prohibition of “any material, compound, mixture, or preparation containing any amount

of . . . dimethyltryptamine” is not susceptible of an interpretation that would allow the use of ayahuasca, a preparation containing dimethyltryptamine. Therefore, neither comity nor any other general principle of international law requires such an outcome.

Plaintiffs argue that the applicability of the doctrine of comity is “strengthened” by the “affirmation of the primacy of religious belief” contained in the United Nations International Covenant on Civil and Political Rights (“ICCPR”), 138 Cong. Rec. S4781–84 (1992), and the Universal Declaration of Human Rights (“Universal Declaration”), GA res. 217A, Dec. 10, 1948. Defendants in no way dispute the proposition contained in these agreements that religious freedom is a basic human right. However, the United States has always recognized that, “[w]hile the freedom to believe and profess whatever religious doctrine one desires is absolute, the freedom to act cannot be.” *Meyers*, 95 F.3d at 1480. Thus, “activities of individuals, even when religiously motivated, are often subject to regulation . . . in the exercise of [the government’s] undoubted power to promote the health, safety, and general welfare.” *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972). The international agreements to which Plaintiffs refer also recognize this principle. The ICCPR provides that “[f]reedom to manifest one’s religion or beliefs may be subject to . . . such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.” ICCPR art. 18. The Universal Declaration similarly provides that people, in the exercise of their rights and freedoms, are subject to “such limitations as are determined by law . . . for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society.” Universal Declaration art. 29 ¶ 3.

That the signatories to the ICCPR and the Universal Declaration did not intend to require countries to permit all religious ingestion of controlled substances is made clear by the fact that a large number of the signatories to these agreements were also signatories to the 1971 Convention on Psychotropic Substances. The 1971 Convention unambiguously requires signatory nations to restrict the religious use of preparations containing Schedule I substances (like DMT) to the use of indigenous plants by small,

clearly determined groups, and requires signatories to make a reservation with respect to any such plant “at the time of signature, ratification or accession.” 1971 Convention art. 32 ¶ 4. No other religious use of Schedule I substances is permitted. When the general provisions of the ICCPR and the Universal Declaration, subject as they are to laws designed to promote public health and welfare, are read in conjunction with the specific provisions of the 1971 Convention (a treaty explicitly concerned with “public health” and “welfare,” *see* Preamble) prohibiting all but a single, narrow religious use of Schedule I controlled substances, it is clear that the former agreements do not bar countries from acting either individually or in concert to prohibit the use, including the religious use, of controlled substances.

Finally, Plaintiffs argue that their comity argument is strengthened by this country’s International Religious Freedom Act (“IRFA”), Pub. L. No. 105-292, 112 Stat. 2787 (1998) (codified at 22 U.S.C. §§ 6401–6481). Plaintiffs’ Motion at 42–44. The Act affirms the United States’ policy “to condemn violations of religious freedom, and to promote, and to assist other governments in the promotion of, the fundamental right to religious freedom,” 22 U.S.C. § 6401(b)(1), and “[t]o work with foreign governments that affirm and protect religious freedom, in order to develop multilateral documents and initiatives to combat violations of religious freedom and promote the right to religious freedom abroad.” 22 U.S.C. § 6401(b)(4). The Act does not suggest, however, that every governmental action that restricts a person’s ability to practice his or her religion is a violation of religious freedom. The Act specifically defines “violations of religious freedom” as follows:

The term “violations of religious freedom” means violations of the internationally recognized right to freedom of religion and religious belief and practice, as set forth in the international instruments referred to in section 2(a)(2) and as described in section 2(a)(3), including violations such as—

(A) arbitrary prohibitions on, restrictions of, or punishment for—

(i) assembling for peaceful religious activities such as worship, preaching, and prayer, including arbitrary registration requirements;

- (ii) speaking freely about one's religious beliefs;
- (iii) changing one's religious beliefs and affiliation;
- (iv) possession and distribution of religious literature, including Bibles; or
- (v) raising one's children in the religious teachings and practices of one's choice; or
- (B) any of the following acts if committed on account of an individual's religious belief or practice: detention, interrogation, imposition of an onerous financial penalty, forced labor, forced mass resettlement, imprisonment, forced religious conversion, beating, torture, mutilation, rape, enslavement, murder, and execution.

22 U.S.C. § 6402(13). The “international instruments” referred to in this passage are the ICCPR, the Universal Declaration, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms. *See* 22 U.S.C. § 6401(a)(2). None of these agreements prohibits countries from passing laws regulating conduct to protect the public health and welfare. As defined by the Act, therefore, there is no violation of religious freedom involved in restricting the ingestion of substances that are controlled under valid public health legislation.

Moreover, while IRFA might counsel in favor of the United States “grant[ing] the same rights to an officially recognized Brazilian religion to practice in this country that we would hope and expect Brazil or any other foreign country to grant for the practice of an American religion in its territory,” [citing] Plaintiffs’ Motion IRFA does not require other countries to provide *more* freedoms to American religions than the freedoms that the United States itself would provide. The United States restricts the use of controlled substances by American religions as well as non-American ones. *See, e.g., Peyote Way*, 922 F.2d at 1210. Because the United States would not ask Brazil to allow American religions the freedom to use psychotropic substances, there is no breach of “mutual expectations” in denying Brazilian religions the same freedom.

To summarize, considerations of international law do not suggest that the United States should allow the UDV to use a prepa-

ration containing DMT. The general doctrine of international comity cannot be used to override a clear domestic statute, and the international agreements cited by Plaintiffs recognize that the freedom to manifest one's religious beliefs is subject to domestic law respecting public health, order, and welfare. Indeed, international law considerations counsel strongly *against* allowing the UDV's use of ayahuasca, in that the 1971 Convention specifically requires signatories to outlaw the use of any preparation containing DMT except for scientific and medical purposes and a limited religious use to which the UDV's use does not conform.

\* \* \* \*

***e. Designation of foreign narcotics traffickers***

On June 1, 2001, the White House issued a fact sheet providing an overview of the Foreign Narcotics Kingpin Designation Act, 21 U.S.C. §§ 1901–1908, 8 U.S.C. § 1182 and listing names of drug traffickers upon whom the President had determined to impose sanctions pursuant to the Act. Under the Kingpin Act, the President must submit by June 1 of each year a report to designated congressional committees identifying publicly those significant foreign narcotics traffickers who are appropriate for sanctions. As indicated in the fact sheet, the Kingpin Act was modeled on the effective sanctions program already in place against the Colombian drug cartels pursuant to Executive Order 12978 issued in October 1995 under authority of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1701 *et seq.*

On October 16, 2001, the President took action to continue for another year the national emergency with respect to the Colombian cartels, blocking certain property and interests in property and prohibiting certain transactions or dealings by United States persons or within the United States. 46 Fed.Reg. 53073 (Oct. 19, 2001). Annual renewal of such emergencies is required under § 202(d) of the National Emergencies Act, 50 U.S.C. § 1622(d).

The fact sheet, set forth below, is available at [www.whitehouse.gov/news/releases/2001/06/20010601-3.html](http://www.whitehouse.gov/news/releases/2001/06/20010601-3.html).

\* \* \* \*

## Background

The [purpose of the] Kingpin Act . . . is to deny significant foreign narcotics traffickers, their related businesses, and their operatives access to the U.S. financial system and all trade and transactions involving U.S. companies and individuals. The Kingpin Act authorizes the President to take these actions when he determines that a foreign narcotics trafficker presents a threat to the national security, foreign policy, or economy of the United States. Congress modeled the Kingpin Act after the effective sanctions program that the Department of the Treasury's Office of Foreign Assets Control ("OFAC") administers against the Colombian drug cartels pursuant to Executive Order 12978 issued in October 1995 under authority of the International Emergency Economic Powers Act ("IEEPA").

## Implementation

The Kingpin Act requires that the Departments of Treasury, Justice, State, and Defense, and the Central Intelligence Agency, coordinate to identify proposed kingpins for designation by the President. By June 1 each year, the President is required to report to specified congressional committees those "foreign persons [he] determines are appropriate for sanctions" and detailing publicly his intent to impose sanctions upon those foreign persons pursuant to the Act. While this is a recurring annual requirement, the President may designate significant foreign narcotics traffickers at any time.

The long-term effectiveness of the Kingpin Act is enhanced by the Department of the Treasury's authority (in consultation with the Departments of Justice, State, and Defense, and the Central Intelligence Agency, the Federal Bureau of Investigation, and the Drug Enforcement Administration) to make derivative designations as in OFAC's program against the drug cartels in Colombia. This authority broadens the scope of application of the economic sanctions against designated kingpins to include their businesses and operatives. In addition, designated individuals and immediate family members who have knowingly bene-



fited from the designated individuals' illicit activity will be denied visas to the United States.

The Kingpin Act provides for criminal penalties of up to 10 years imprisonment for individuals and up to a \$10 million fine for entities for violations, as well as a maximum of 30 years imprisonment and/or a \$5 million fine for officers, directors or agents of entities who knowingly participate in violations. The Kingpin Act also provides for civil penalties of up to \$1 million.

### Designations

The foreign persons that the President has determined are appropriate for sanctions pursuant to the Kingpin Act are: Osiel Cardenas Guillen; Miguel Caro Quintero; Joaquin Guzman Loera; Ismael Higuera Guerrero; Oscar Malherbe de Leon; Alcides Ramon Magana; Jose Alvarez Tostado; Sher Afghan; Nasir Ali Khan; Chang Ping Yun; Jamil Hamieh; and Joseph Gilboa. These names are being added to the list of initial designations pursuant to the Kingpin Act announced in June 2000. The initial designations were: Benjamin Alberto Arellano-Felix; Ramon Eduardo Arellano-Felix; Jose de Jesus Amezcua-Contreras; Luis Ignacio Amezcua-Contreras; Rafael Caro-Quintero; Vicente Carrillo-Fuentes; Chang Chi-Fu; Wei Hsueh-Kang; Noel Timothy Heath; Glenroy Vingrove Matthews; Abeni O. Ogungbuyi; and Oluwole A. Ogungbuyi.

## 4. Trafficking in Persons

### a. *Trafficking in Persons Report*

The Department of State released the first annual *Trafficking in Persons Report* pursuant to § 110(b) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386. The excerpts below describe the requirements of the law and the methodology used in preparing the report.

The full text of the report and a Fact Sheet providing examples of anti-trafficking programs planned or being implemented internationally during fiscal years 2000 and 2001 by the Departments of State and Labor and the U.S. Agency for

International Development (USAID) are available at *www.state.gov/g/tip/rls/tiprpt/2001*.

## I. Introduction

### A Growing Phenomenon

Trafficking in persons is a fundamental and crucially important challenge in the areas of human rights and law enforcement. Based on reliable estimates, as the Congress has noted, at least 700,000 persons, especially women and children, are trafficked each year across international borders. Some observers estimate that the number may be significantly higher. Victims are forced to toil in sweatshops, construction sites, brothels, and fields. Deprived of the enjoyment of their human rights, many victims are subjected to threats against their person and family, violence, horrific living conditions, and dangerous workplaces. Some victims have answered advertisements believing that they will have a good job awaiting them in a new country. Others have been sold into this modern-day form of slavery by a relative, acquaintance, or family friend. Trafficking occurs across borders and within countries. It is found in both developed and developing nations, in countries where the government abuses human rights, and in countries where the government's human rights record is generally excellent.

Root causes of trafficking include greed, moral turpitude, economics, political instability and transition, and social factors. Many traffickers are involved in other transnational crimes. Criminal groups choose to traffic in human beings as well because it is high-profit and often up to now low risk, because unlike other "commodities" people can be used repeatedly, and because trafficking does not require a large capital investment. They have little respect for the rights or dignity of their victims.

\* \* \* \*

### The Offense and its Victims

It is within this context of growing international concern and action to combat trafficking of persons that Congress passed the

Victims of Trafficking and Violence Protection Act of 2000 (the “Act”), P.L. 106-386. The Act requires that by June 1 the Secretary of State submit a report to Congress with respect to the status of severe forms of trafficking in persons. The Act defines “severe forms of trafficking in persons” as

(a) sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age; or (b) the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.

For the purpose of this report, the term “trafficking” refers to actions that fall within this definition.

As an underground criminal activity, the scope of trafficking is difficult to measure accurately. In some countries, particularly transit countries, it is difficult to distinguish between alien smuggling and trafficking. The mere facilitation of illegal entry into a country is not considered trafficking, unless it meets the Act’s definition, for example because it involves force, fraud, or coercion. Further difficulty in measuring the scope of the problem arises from the fact that many victims come from countries in which the authorities are a source of fear rather than of assistance, and victims are often reluctant to seek help once they fall into the hands of traffickers. In some countries, the victims themselves are prosecuted and jailed for violating immigration or other laws. Moreover, traffickers may threaten victims or their families.

The problem of trafficking in persons is not new—it is in many ways a modern-day form of slavery, which has persisted into the twenty-first century. Yet it is only in the past several years that the contemporary manifestation of this problem has captured international governmental attention, and that governments have begun to address it systematically. It is telling that even some countries that are pro-active and meet the Act’s minimum standards for addressing trafficking still have a significant trafficking problem—a reminder that the world has a long way to go to stop this horrific practice. Governments need strong individual and collective action to combat this phenomenon and to bring those

responsible to justice. The immensity of the problem simply overwhelms the capabilities of some countries, and, without collective action by other origin, transit and destination countries, the best intentions of a country may not suffice to meet the minimum standards.

### **U.S. Commitment**

The U.S. is principally a transit and destination country for trafficking in persons. It is estimated that 45,000 to 50,000 people, primarily women and children, are trafficked to the U.S. annually. The U.S. Government is strongly committed to combating trafficking in persons at home and abroad. The Act enhances pre-existing criminal penalties, affords new protections to trafficking victims, and makes available certain benefits and services to victims of severe forms of trafficking; establishes a Cabinet-level federal interagency task force to investigate and prosecute trafficking, and establishes a federal pilot program to provide services to trafficking victims. The U.S. government recognizes the need to sustain and further enhance our efforts in order to achieve the goals and objectives of the Act.

The U.S. Department of State began monitoring trafficking in persons in 1994, when the issue began to be covered in the Department's Annual Country Reports on Human Rights Practices. Originally, coverage focused on trafficking of women and girls for sexual purposes. Our understanding of the problem has broadened over the years, and U.S. embassies worldwide now routinely monitor and report on cases of trafficking in men, women, and children for forced labor in agriculture, domestic service, construction work, and sweatshops, as well as trafficking for commercial sexual exploitation.

The U.S. has initiated many international anti-trafficking and development programs to assist countries combat this ever-growing phenomenon. These initiatives demonstrate the United States' commitment to preventing persons from becoming victims of trafficking; protecting the victims of trafficking; and, prosecuting traffickers. Our development programs include disseminating information on the dangers of trafficking, strengthening the capacity of women's and anti-trafficking organizations to protect those

groups from abuse and violence, and outreach and economic opportunity programs for those most at risk of being trafficked. The U.S. has assisted countries to enact anti-trafficking legislation, and train law enforcement, prosecutors and judicial officers.

## The Report

In preparing this report, the Department of State in Washington asked for information from our embassies and consulates around the world. . . . The Department also reviewed information from other sources including, but not limited to, UNICEF, UNHCR, the International Organization for Migration, Human Rights Watch, Amnesty International, the Protection Project, and media reports. Other U.S. Government agencies have also provided further information on trafficking for this report. The report covers events through April 15, 2001.

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## Tiers

Countries\* are included in the report because they have a significant number of victims. Countries were placed in tier 1 because they fully comply with the law's minimum standards. Such countries criminalize and have successfully prosecuted trafficking, and have provided a wide range of protective services to victims. In addition, their governments sponsor or coordinate prevention campaigns aimed at stemming the flow of trafficking. Some of these governments face resource constraints and other obstacles to combating trafficking, but are working to stop this practice to the best of their ability.

The Act states that those countries should be placed in tier 2 that do not yet fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards. Some are strong in the prosecution of traffickers, but provide little or no assistance to victims. Others

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\* Under section 4(b) of the Taiwan Relations Act, "[w]henever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan."

work to assist victims and punish traffickers, but have not yet taken any significant steps to prevent trafficking. Some governments are only beginning to address trafficking, but nonetheless have already taken significant steps.

According to the Act, countries in tier 3 do not fully comply with the minimum standards and are not making significant efforts to bring themselves into compliance. Some of these countries refuse to acknowledge the trafficking problem within their territory. On a more positive note, several other countries in this category are beginning to take concrete steps to combat trafficking. While these steps do not yet reach the level of significant under the statute, many of these countries are on the right path to placement on tier 2.

A problem was posed by several countries in which rebel groups engage in trafficking within territory that they control, for example, forcing children to become soldiers or laborers, or to provide sexual services to rebels. In these cases, the trafficking problem may be entirely beyond the government's control, and the government may be unable to take many steps, along the lines of the Act's "minimum standards," to combat that problem. In such cases, this report categorizes countries primarily based on what steps, if any, governments have taken to assist these victims. In several cases, while a government indirectly combats traffickers through armed struggle with rebel groups, it is at the same time providing direct services and assistance to victims.

According to the Act, beginning with the 2003 report, countries on the Tier 3 list will be subject to certain sanctions, principally termination of non-humanitarian, non-trade-related assistance. Such countries would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions, specifically the International Monetary Fund and multilateral development banks such as the World Bank. Certain of the sanctions may be waived under certain circumstances, including upon a national interest determination by the President.

## Steps Toward Solutions

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the UN Convention against Transnational Organized Crime adopted by the UN General Assembly in November 2000, is an important new tool to facilitate international cooperation. Governments that sign and ratify this protocol make a commitment to criminalize trafficking and to protect its many victims. The United States and 80 other countries signed the Protocol in December 2000. Two other international instruments that address sale and trafficking in children have also recently been adopted—International Labor Organization (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (which the United States ratified in December 1999), and the Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography (which the United States signed in July 2000).

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**b. *Other U.S. implementation measures***

In October 2001, the Secretary of State established the Office to Monitor and Combat Trafficking in persons, as authorized by § 105(e) of the Act. The Office will support an Interagency Task Force to Monitor and Combat Trafficking in Persons to be established in 2002 to strengthen coordination among key agencies working to fight trafficking and to identify opportunities to bolster efforts to prosecute traffickers, protect victims, and prevent future trafficking.

On July 24, 2001, the Departments of Justice and State issued interim regulations implementing § 107(c) of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. 106-386. 66 Fed.Reg. 38514 (July 24, 2001). Excerpts from the notice provided below explain the purpose of the regulations.

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... When Congress passed [the Trafficking Victims Protection Act of 2000 (TVPA)], it provided a comprehensive set of tools for the federal government to combat trafficking in persons, in the United

States and around the world, through prevention, prosecution and enforcement against traffickers, and protection and assistance for victims of trafficking in persons.

This regulation implements section 17(c) of the TVPA and provides guidance concerning: (1) Protections for victims of severe forms of trafficking in persons while in custody (section 107(c)(1)); (2) victims' access to information and translation services (section 107(c)(2)); (3) authority to permit continued presence in the United States of a victim and potential witness (section 107(c)(3); and (4) training of government personnel (section 107(c)(4)).

## **5. Cybercrime**

### ***a. Signing of Cybercrime Convention***

On November 23, 2001, the United States and 29 other countries signed the Council of Europe Convention on Cybercrime at a conference in Budapest, Hungary, 41 I.L.M. 282 (2002). The Convention is the first multilateral instrument to address the problems posed by the spread of criminal activity on computer networks. It will require States Parties to establish laws against cybercrime, to ensure that their law enforcement officials have the necessary procedural authorities to investigate and prosecute cybercrime offenses effectively, and to provide international cooperation to other Parties in the fight against computer-related crime. The Convention will help deny "safe havens" to cyber-criminals, including cyber-terrorists.

Drafting and negotiation of the Convention began in 1997. As an "observer" to the COE, the United States participated actively in the negotiations and played a major role in shaping the Convention and its Explanatory Report, which serves as a fundamental interpretative guide to the Convention's provisions. (Canada, Japan and South Africa also participated as observers.)

In testimony before the Subcommittee on Crime, Committee on the Judiciary, U.S. House of Representatives on June 12, 2001, while negotiations were still ongoing, Michael Chertoff, Assistant Attorney General, Criminal Division,



Department of Justice, explained the concerns of the United States in the growing area of cybercrime and efforts to combat its international dimensions.

Mr. Chertoff's testimony as well as the text of the Convention and its Explanatory Report are available at [www.cybercrime.gov](http://www.cybercrime.gov), a web site on cybercrime issues maintained by the Department of Justice.

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### The nature and severity of cybercrime

Over the last decade, use of computers and the Internet has grown exponentially. Indeed, for many individuals it is an integral part of their daily lives. With little more than a click of a mouse, people can communicate, transfer information, engage in commerce, and expand their educational opportunities. Unfortunately, criminals exploit these same technologies to commit crimes and harm the safety, security, and privacy of us all. Indeed, as more people go online, more criminals are realizing that online crime can be lucrative, especially given the amount of valuable commercial and personal information now being stored electronically.

So-called "cybercrime" can be divided into two categories. On the one hand, we are seeing the migration of "traditional" crimes from the physical to the online world. These crimes include threats, child pornography, fraud, gambling, extortion, and theft of intellectual property. Simply put, criminals are migrating online because they can reach more victims quickly, can collaborate with other criminals, can disguise their identities, and can use the global nature of the Internet to remain anonymous.

On the other hand, the Internet has spawned an entirely new set of criminal activity that targets computer networks themselves. Included in this category are such crimes as hacking, releasing viruses, and shutting down computers by flooding them with unwanted information (so-called "denial of service" attacks). Our vulnerability to—and the damages caused by—this type of crime are astonishingly high. For example, in May of last year, the "I Love You" Virus began to infect computers on the Internet. Within a short period of time, it had disrupted the communications of

hundreds of thousands of computers, causing losses estimated in the billions of dollars. Just as disturbing, this virus demonstrated a new capability: when it infected a computer, it accessed the user's computer passwords and sent them electronically to a computer in a foreign country. The implications of this virus—and the many viruses that have followed it—are staggering.

In March of this year, the FBI's National Infrastructure Protection Center issued a warning that an organized group of hackers from Russia and Eastern Europe had committed a series of intrusions into more than forty banks and e-commerce companies in the United States. The hackers stole over 1,000,000 credit card numbers from the companies' data bases. They then embarked on extortion of many of the companies, threatening to disclose confidential information or damage the victims' computer systems. Evidence suggests that the hackers then sold many of the credit card numbers to organized crime groups.

This crime—the investigation into which the Treasury Department participated and which has to date resulted in two arrests—has grave implications. Not only did it cause financial losses for the companies, but it harmed the privacy and security of the ordinary citizens whose credit cards numbers and personal data were stolen. Individuals victimized by these sorts of crimes rightfully fear the ramifications of criminals' gaining access to their private financial and personal data. Moreover, this kind of crime strikes at the confidence of consumers, threatening the vital growth of e-commerce.

Network crimes not only affect the security of individuals and businesses, they can also threaten our nation's critical infrastructures. Our power and water supply systems, telecommunications networks, financial sector, and critical government services, such as emergency and national defense services, all rely on computer networks. This reliance on computer networks creates new vulnerabilities.

For example, for a real-world terrorist to blow up a dam, he would need tons of explosives, a delivery system, and a surreptitious means of evading armed security guards. For a cyberterrorist, the same devastating result could be achieved by hacking into the control network and commanding the computer to open the floodgates. This is not a purely hypothetical scenario. Several years

ago, a juvenile hacker gained unauthorized access to the computers controlling the operations of the Roosevelt Dam in Arizona.

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The challenges on the international level are greater [than domestic cooperative efforts]. When we deal with a transborder cybercrime, we need foreign law enforcement counterparts who not only have the necessary technical expertise, but who are accessible and responsive, and who have the necessary legal authority to cooperate with us and assist us in our investigations and prosecutions. The Criminal Division has played a central role in attempting to build these sorts of partnerships internationally, and I expect it to continue to do so.

For example, within the larger law enforcement framework of the G-8's Lyon Group, there is a Subgroup on High-tech Crime which, from its inception, has been chaired by a senior attorney from [the Computer Crime and Intellectual Property Section of the Criminal Division of the U.S. Department of Justice ("CCIPS")]. One of its important accomplishments was the development of a "24/7 network" which allows law enforcement contacts in each participating country to reach out—24 hours a day, seven days a week—to counterparts in other countries for rapid assistance in investigating computer crime and preserving electronic evidence. The Subgroup has also to date sponsored many meetings, including three major conferences, that have brought together government and private sector representatives of all the G-8 countries to discuss cybercrime issues.

As part of our efforts to forge an effective framework for international partnership, the Department, and in particular the Criminal Division, has been engaged in the lengthy and still ongoing process of negotiating a cybercrime treaty in the Council of Europe. Since those negotiations have not yet concluded, I believe it would be premature to discuss the treaty in detail. Nonetheless, if a solid text emerges, it would be a significant legal instrument to assist us in combating cybercrime.

One aspect of our work on the treaty I do want to note especially, however, is the extent to which we have sought to engage the private sector, some elements of which had expressed concerns about aspects of the evolving draft and about the process at the Council of Europe, whose proceedings in this context have

not been open to the public. The United States delegation pressed hard for the COE to depart from past practice and publish working drafts of the text, which it began to do more than a year ago. Thereafter, representatives of the Justice Department, along with those from the State and Commerce Departments—the agencies that form our delegation—met on numerous occasions with industry and privacy groups to hear their concerns. As a result, our delegation worked hard, and with a large measure of success, to obtain a number of changes to the treaty sought by industry and privacy groups.

Of course, our dialogue with industry on the international front is part of a much broader partnership between law enforcement and industry to combat cybercrime and protect the nation's critical infrastructures.

As the builders and owners of the infrastructure that supports cyberspace, private sector companies have primary responsibility for securing and protecting the Internet. CCIPS, the National Infrastructure Protection Center (NIPC), and the CTC network have engaged in regular outreach to industry to ensure that communications channels are open between government and the private sector and to encourage cooperation on efforts to prevent and combat computer and intellectual property crimes. For example, the NIPC, in conjunction with the private sector, has developed the "InfraGard" initiative to expand direct contacts between government and private sector infrastructure owners and operators, and to share information about computer intrusions, vulnerabilities, and infrastructure threats.

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***b. Applicability of Convention***

Article 41 of the Cybercrime Convention addresses issues arising in nations with federal systems such as the United States. To clarify the applicability of certain obligations undertaken by parties to the Convention, Article 41 provides that countries such as the United States may take a reservation, as set forth below. The corresponding text in the official Explanatory Report, which the United States participated in drafting, is also provided.

The full text of the Convention and the Explanatory Report is available at <http://conventions.coe.int/treaty/EN/cadreprincipal.htm>.

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## Article 41—Federal Clause

1. A federal State may reserve the right to assume obligations under Chapter II of this Convention consistent with its fundamental principles governing the relationship between its central government and constituent States or other similar territorial entities provided that it is still able to co-operate under Chapter III.

2. When making a reservation under paragraph 1, a federal State may not apply the terms of such reservations to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures.

3. With regard to the provisions of this Convention, the application of which comes under the jurisdiction of constituent States or other similar territorial entities, that are not obliged by the constitutional system of the federation to take legislative measures, the federal government shall inform the competent authorities of such States of the said provisions with its favourable opinion, encouraging them to take appropriate action to give them effect.

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## Explanatory Report (adopted on 8 November 2001)

I. The Convention and its Explanatory Report have been adopted by the Committee of Ministers of the Council of Europe at its 109th Session (8 November 2001) and the Convention has been opened for signature in Budapest, on 23 November 2001, on the issue of the International Conference on Cybercrime.

II. The text of this explanatory report does not constitute an instrument providing an authoritative interpretation of the

Convention, although it might be of such a nature as to facilitate the application of the provisions contained therein.<sup>1</sup>

\* \* \* \*

*Federal clause (Article 41)*

316. Consistent with the goal of enabling the largest possible number of States to become Parties, Article 41 allows for a reservation which is intended to accommodate the difficulties federal States may face as a result of their characteristic distribution of power between central and regional authorities. Precedents exist outside the criminal law area for federal declarations or reservations to other international agreements [footnote omitted]. Here, Article 41 recognises that minor variations in coverage may occur as a result of well-established domestic law and practice of a Party which is a federal State. Such variations must be based on its Constitution or other fundamental principles concerning the division of powers in criminal justice matters between the central government and the constituent States or territorial entities of a federal State. There was agreement among the drafters of the Convention that the operation of the federal clause would only lead to minor variations in the application of the Convention.

317. For example, in the United States, under its Constitution and fundamental principles of federalism, federal criminal legislation generally regulates conduct based on its effects on interstate or foreign commerce, while matters of minimal or purely local concern are traditionally regulated by the constituent States. This approach to federalism still provides for broad coverage of illegal conduct encompassed by this Convention under US federal criminal law, but recognises that the constituent States would continue to regulate conduct that has only minor impact or is purely local in character. In some instances, within that narrow

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<sup>1</sup> Editor's Note: In a letter of September 10, 1999, to Robert Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, the COE Treaty Office explained that the explanatory report "is not an integral part of the treaty . . . but a part of the context of the treaty, being an instrument made in connection with the conclusion of the treaty and accepted by the parties. In this respect it is a fundamental element for interpretation of the treaty, to which the Parties and the Council of Europe Secretariate often refer in practice."

category of conduct regulated by State but not federal law, a constituent State may not provide for a measure that would otherwise fall within the scope of this Convention. For example, an attack on a stand-alone personal computer, or network of computers linked together in a single building, may only be criminal if provided for under the law of the State in which the attack took place; however the attack would be a federal offence if access to the computer took place through the Internet, since the use of the Internet provides the effect on interstate or foreign commerce necessary to invoke federal law. The implementation of this Convention through United States federal law, or through the law of another federal State under similar circumstances, would be in conformity with the requirements of Article 41.

318. The scope of application of the federal clause has been restricted to the provisions of Chapter II (substantive criminal law, procedural law and jurisdiction). Federal States making use of this provision would still be under the obligation to co-operate with the other Parties under Chapter III, even where the constituent State or other similar territorial entity in which a fugitive or evidence is located does not criminalise conduct or does not have procedures required under the Convention.

319. In addition, paragraph 2 of Article 41 provides that a federal State, when making a reservation under paragraph 1 of this Article, may not apply the terms of such reservation to exclude or substantially diminish its obligations to provide for measures set forth in Chapter II. Overall, it shall provide for a broad and effective law enforcement capability with respect to those measures. In respect of provisions the implementation of which come within the legislative jurisdiction of the constituent States or other similar territorial entities, the federal government shall refer the provisions to the authorities of these entities with a favourable endorsement, encouraging them to take appropriate action to give them effect.

## **6. Corruption**

### ***a. Inter-American Convention against Corruption report***

In April 2001 the Department of State submitted its first annual report to Congress on the Inter-American Convention

Against Corruption, 35 I.L.M. 724 (1996), as required by paragraph (c)(1) of the Resolution of Advice and Consent to Ratification of the Convention, adopted by the Senate of the United States on July 27, 2000. 146 CONG.REC. S6256-04. The excerpts from the Report provided below describe the Convention and the current effort to establish an obligatory mutual evaluation mechanism, and the United States role in these matters.

The full text of the report is available at [www.state.gov/g/inl/rls/rpt/3350.htm](http://www.state.gov/g/inl/rls/rpt/3350.htm). Further documentation concerning the development of a follow-up mechanism to the Convention, in which the United States is significantly involved, are available at [www.oas.org](http://www.oas.org).

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## I. Introduction

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The Inter-American Convention Against Corruption (“the Inter-American Convention” or “the Convention”) identifies acts of corruption to which the Convention will apply and contains articles that create binding obligations under international law as well as hortatory principles to fight corruption. The Convention also provides for institutional development and enforcement of anticorruption measures, requirements for the criminalization of specified acts of corruption and articles on extradition, seizure of assets, mutual legal assistance and technical assistance where acts of corruption occur or have effect in one of the States Parties. In addition, subject to each Party’s constitution and the fundamental principles of its legal system, the Convention requires Parties to criminalize bribery of foreign government officials and illicit enrichment.

The Convention pioneers emphasis upon the importance of preventive measures. While the criminalization and prosecution of acts of corruption are indispensable, they are insufficient to prevent corruption effectively in governmental institutions. Therefore, additional measures must be taken that operate specifically to prevent corruption before an offense actually occurs. Thus, the Convention contains a series of preventive measures



that the Parties agree to consider establishing to prevent corruption. The goal of the Convention is to create a comprehensive system that will effectively deter and control corruption in institutions of government, by preventing, disclosing and punishing acts of corruption by public officials.

The Convention recognizes that the problem of corruption is a major obstacle to development in the Americas. The United States continues to work with its hemispheric partners to find common solutions to common challenges. Corruption slows and impedes democratic institutions, undermines the public trust, hurts economic development, and weakens the rule of law. Corruption also furthers and protects other transnational criminal activity, including drug trafficking, money laundering, organized crime, and smuggling.

The Inter-American Convention was the first formal international instrument against corruption in the world to be negotiated and adopted. An initiative of the first Summit of the Americas in 1994, it entered into force in 1997. The United States deposited its instrument of ratification with the Secretary General of the OAS in September 2000. The OAS is now working on an evaluation mechanism to assist governments that have ratified the Convention to implement those commitments. The mechanism is expected to begin functioning in 2001.

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## **V. Progress at the Organization of American States on a Monitoring Process**

The Inter-American Convention, unlike the later OECD Anti-Bribery Convention and Council of Europe Criminal Law Convention, does not include an obligatory mutual evaluation mechanism. The negotiations leading to the adoption of the Convention did not include any discussion of such an evaluation mechanism. However, comparisons between the Convention and other international anticorruption instruments, and other observations about the implementation of the Inter-American Convention, prompted considerable discussion about the need for such a mechanism.

The United States initially proposed in June 1999 that the OAS General Assembly agree to establish a mechanism for monitoring implementation of the Inter-American Convention. This

proposal was greeted with some skepticism, but the General Assembly approved a resolution requesting the Permanent Council's Working Group on Probity and Public Ethics to examine the subject. This Working Group is also authorized to compile and study national legislation relevant to public ethics; discuss experiences in the control and oversight of existing administrative institutions; make a checklist of crimes related to public ethics; and make recommendations on judicial mechanisms to address such crimes. . . . Subsequently the Working Group and the Permanent Council proposed, and the OAS General Assembly in June 2000 approved, Resolution AG/RES, 1723 which instructed the Permanent Council:

“to analyze existing regional and international follow-up mechanisms with a view ending, by the end of 2000, the most appropriate model view to recommending that State Parties could use, if they think fit to monitor implementation of the Convention. That recommendation will be transmitted to the State Parties to the Convention for them to choose the course of action they deem most appropriate.”

The OAS Committee on Juridical and Political Affairs referred this mandate to the Working Group on Probity and Public Ethics, which convened on September 7, 2000 under the Chairmanship of Mauricio Alice, Alternate Permanent Representative from Argentina. . . . By late 2000, the Working Group produced a recommendation that called for the creation of a body of experts, and presented a set of guidelines for an evaluation of the implementation of the Convention. The purposes of the mechanism are to promote implementation of the Convention, and “to facilitate technical cooperation activities, the exchange of information, experience and best practices, and the harmonization of the anticorruption legislation of the States Parties.” Only countries that have ratified the Convention would participate in the evaluation process.

Regarding civil society participation in the review process, the Working Group recommended that while the mechanism would be intergovernmental in nature, the Committee of Experts may receive written comments from non-governmental bodies, “taking into account the Guidelines for the Participation of Civil

Society Organizations in OAS activities, as well as the definition of civil society in AG/RES. 1661 (XXIX-0/99).” This will include the private sector and non-governmental organizations.

On January 18, 2001, the Permanent Council accepted the Working Group’s recommendations and transmitted them to the States Parties to the Convention in Resolution CP/RES-783 (Appendix E). . . .

***b. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions report***

On June 29, 2001, the State Department issued its third annual report to Congress reviewing implementation and enforcement of the Organization of Economic and Cooperative Development (“OECD”) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, 37 I.L.M. 1 (1998). The report fulfills the requirements of paragraph (c)(1) of the Senate Resolution of Advice and Consent to ratification of the Convention, July 31, 1998. 144 CONG.REC. S9668. Excerpts from the media note announcing its release describe the focus of the Report and other efforts to combat corruption.

The report is available at [www.state.gov/e/eb/cba/gc](http://www.state.gov/e/eb/cba/gc).

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This report analyses the implementing legislation of seven of the countries that have ratified the Convention since our 2000 report and updates the information on 21 other Parties to the Convention. The report also provides updated information on enforcement of the Convention, measures taken by the signatories to end the tax deductibility of bribes, areas where the Convention might be strengthened, and efforts at encouraging additional non-OECD key exporting states to join the Convention.

Our review of the legislation of the foreign countries in this report indicates that most Parties have taken effective steps to make bribery of foreign public officials illegal under their domestic law. We believe, however, that the laws of some countries fall

short of the Convention's requirements. We are also disturbed by continuing reports of alleged bribery of foreign public officials by firms based in countries for which the Convention is in force. We will continue both bilaterally and in the OECD to urge these countries to remedy these legislative and enforcement deficiencies. All signatories have an interest in ensuring that all Parties vigorously implement and enforce the Convention.

The OECD Convention represents a key element in the Administration's wider campaign to combat corruption and promote fair competition. The United States initiated and hosted the first of a series of Global Forums on Fighting Corruption. The first was held in Washington, D.C. in February 1999, and the Second Global Forum, held in the Netherlands in May 2001, was co-sponsored by the United States. These meetings have placed a strong emphasis on combating corruption in the public service. In our own hemisphere, the United States and over 20 other nations have ratified the Inter-American Convention Against Corruption, which was negotiated under the auspices of the Organization of American States in 1996.

## **C. INTERNATIONAL CRIMINAL TRIBUNALS**

### **1. Role of International Criminal Tribunals**

On December 19, 2001, Pierre-Richard Prosper, U.S. Ambassador-at-Large for War Crimes Issues, spoke at an academic conference held at The Peace Palace, The Hague, Netherlands. Excerpts from his speech below provide the view of the United States on the role of international tribunals and domestic courts in pursuing accountability for war crimes.

The full text is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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The acts of September 11th remind us that there must be accountability and the rule of law. The fundamental truth is that the rule of law defends civilization by erecting a wall of reason and humanity against savagery and brutality. To that end, and in

the interests of preserving civilization across the world, the United States is committed more than ever to bringing perpetrators of war crimes and [other] violators of international humanitarian law to justice both abroad and at home. We remain committed to working within the global community to confront the challenges that would destroy us all. We pledge to use our available resources and influence to promote the cause of freedom and liberty for all people.

### **The International Criminal Court**

As many of you know, the International Criminal Court has been a point of concern for the United States. This concern has not changed as a result of September 11th. While the United States has sought from the inception of the debate at the end of World War II a court that could be neutral, focused on the pursuit of efficient justice, and most of all immune from the poisonous taint of raw political power, the Bush Administration, as with the previous administration, opposes the Rome treaty. And despite the signature [authorized] by President Clinton, we—like the previous administration—will not send it to the United States Senate for ratification.

We are steadfast in our concerns and committed to our beliefs that the United States cannot be part of a process that lacks the essential safeguards to avoid a politicization of the process. We also firmly believe that the ICC treaty is just that—a treaty. Therefore it does not and should not have jurisdiction over a non-party state absent United Nations Security Council action. The United States has a unique role in the world in helping to defend freedom and advance the cause of humanity. We will continue to meet our responsibility but not at the price of our national security.

### **Bush Administration Philosophical Framework**

This does not mean, however, that we are prepared to disregard the pursuit of accountability and justice on the world stage. To the contrary, we remain deeply committed. . . . We begin our approach from the domestic side of the ledger. As I recently testified before the United States Senate Committee on the Judiciary:

“the international practice should be to support sovereign states seeking justice domestically when it is feasible and would be credible. . . . International tribunals are not and should not be the courts of first redress, but of last resort. When domestic justice is not possible for egregious war crimes due to a failed state or a dysfunctional judicial system, the international community may through the Security Council or by consent, step in on an ad hoc basis as in Rwanda and Yugoslavia. . . .”

It is “this administration’s policy . . . to encourage states to pursue credible justice rather than abdicating the responsibility. Because justice and the administration of justice are a cornerstone of any democracy, pursuing accountability for war crimes while respecting the rule of law by a sovereign state must be encouraged at all times.” This does raise the question of whether the United States will continue to support the existing ad hoc international tribunals created under the authority of the Security Council. We will.

It also raises the question of whether we see a role for the United Nations in pursuing accountability. We do. The United States remains proud of its leadership in working multilaterally to form the two ad hoc tribunals. They have both provided groundbreaking legal decisions and have sent the clear message that architects of genocide will be held responsible for their crimes. While the work to date has greatly contributed to humanity, the long-term legacy of the Tribunals will be crafted over the next few years. In order to be deemed a success, they must have a successful conclusion. And, in order to fulfill the spirit of the Security Council, they must begin to aggressively focus on the end-game.

### **Foundational Principles of the Ad Hoc Tribunals**

In establishing the Tribunals in UNSC Resolutions 827 and 955, the Security Council noted its determination that they were a necessary response to ongoing threats to international peace and security. . . .

The Security Council clearly envisioned the fundamental responsibility of domestic courts for adjudicating some of these serious violations. The statutes specify that domestic courts have concurrent jurisdiction with the Tribunals for the “serious” vio-

lations that the Tribunals are empowered to prosecute. UN Security Council Res. 955 calls for strengthening domestic judicial systems in Rwanda, “in particular to the necessity for those courts to deal with large numbers of suspects.” It is clear that the intention of the Security Council was for the tribunals to prosecute the leadership of the organizations that committed the atrocities, leaving the balance to the states.

The Tribunals should therefore focus on this narrow group of perpetrators as originally envisioned and conclude their work by 2007, a date suggested by President Jorda. A hundred or more indictments may not be helpful and may undermine the pursuit of justice that may be better left to the regional states. We should encourage [International Criminal Tribunal for Yugoslavia (“ICTY”)] to establish clear guidelines with regional states relating to determining which cases will be pursued by ICTY and which cases should be pursued in domestic courts. We should also urge the [International Criminal Tribunal for Rwanda (“ICTR”)] to remain narrow in focus and to encourage local action.

### **State’s Responsibility**

For this to be successful, regional states must pick up the balance and not abdicate their responsibility. The abuses cannot go unpunished, and we cannot pretend that they did not occur. In order to bring the tribunals to a successful conclusion, cooperation by the states in the regions is essential. In regards to the ICTY, the Federal Republic of Yugoslavia must fulfill its obligations and transfer all at large indictees to the Hague.

And for our part, I state to you and put others on clear notice: we are committed to bringing Radovan Karadzic and Ratko Mladic into custody using all possible means. Their trials will be a defining moment in the life of the ICTY and a landmark for history.

### **ICTR: U.S. Policy—Endgame**

We will continue to actively support the International Criminal Tribunal for Rwanda (ICTR). We are increasing assistance, utilizing diplomacy, information collection and the existing Depart-

ment of State rewards program, in locating and apprehending the remaining persons indicted for war crimes, including those who have killed, attacked, and threatened American tourists. We urge other member states to assist the government of Rwanda in all possible ways, including by providing (or advocating that the UN provide) adequate resources. We are pressing states with indicted persons in their territory to turn those individuals over to the Tribunal for trial.

We also encourage the ICTR to establish clear guidelines with the Government of Rwanda relating to which cases will be pursued by the ICTR and which cases should be pursued in Rwandan domestic court, stressing that the Rwandan government should continue to pursue justice against mid and lower ranking individuals through domestic processes, including gacaca. We continue to take an interest in efforts to improve the management of the ICTR. We support the addition of *ad litem* judges to the ICTR to help accelerate the pace of trials, provided that the management of the ICTR is done in such a manner as to ensure the efficient employment of the *ad litem* judges.

### Hybrid approaches

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#### Sierra Leone

In Sierra Leone, the United States has worked diligently along with the international community to facilitate the establishment of a special court to hold accountable those who bear the greatest responsibility for the atrocities. This treaty-based court, with the significant involvement of the Sierra Leone Government as well as the international community, offers the promise of achieving credible justice in a context that will help build the future of the nation by fully respecting its sovereignty and rebuilding its legal structure. The United States supports the establishment of the Special Court, believing that it is one of several essential components necessary to restoring peace and stability to Sierra Leone and the region.



## **Cambodia**

Similarly in Cambodia, the United States is a strong supporter of efforts to bring to justice leaders of the Khmer Rouge who bear most responsibility for atrocities committed between 1975 and 1979. It is important that there be accountability in Cambodia in order to promote the rule of law and develop democracy. We have been encouraging both the Royal Government of Cambodia and the United Nations to be flexible in their approaches and to expeditiously finalize an agreement to ensure credible justice is achieved in the establishment of the Extraordinary Chambers. We are urging a prompt resolution of the issues that divide the Cambodian Government and the United Nations so that the long overdue process of justice and accountability can unfold. We look forward to the UN traveling to Phnom Penh soon to negotiate in good faith this final stage in the process.

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## **2. International Criminal Tribunal for Yugoslavia**

Section 594 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2001, made available up to \$100,000,000 for assistance to Serbia but conditioned the availability of such funds after March 31, 2001, with certain exceptions, on a determination and certification by the President that the Government of the Federal Republic of Yugoslavia is

(1) cooperating with the International Criminal Tribunal for Yugoslavia including access for investigators, the provision of documents, and the surrender and transfer of indictees or assistance in their apprehension;

(2) taking steps that are consistent with the Dayton Accords to end Serbian financial, political, security and other support which has served to maintain separate Republika Srpska institutions; and

(3) taking steps to implement policies which reflect a respect for minority rights and the rule of law.

Section 594 further provides that after March 31, 2001, the Secretary of the Treasury should instruct U.S. executive

directors to international financial institutions (“IFIs”) to support loans and assistance to the FRY Government subject to the same criteria. Pub.L. 106-429 § 594(c). The President delegated his authority under § 594 to the Secretary of State on March 22, 2001. 37 WEEKLY COMP. PRES. DOC. 524 (Apr. 2, 2001).

At the time of the enactment of § 594 in October 2000, an estimated 15 to 20 Serbs publicly indicted by the tribunal remained at large, including former Yugoslav President Slobodan Milosevic, General Ratko Mladic, who led the Bosnian-Serb military and Radovan Karadzic, the Bosnian-Serb wartime civilian leader. In the weeks prior to the March 31 certification date provided in § 594, Yugoslav authorities took a variety of significant actions directly related to the certification criteria. FRY authorities allowed the ICTY liaison office to reopen in Belgrade on March 5. On March 12, a Bosnian Serb indictee, Blagoje Simic, flew from Belgrade to the Netherlands and surrendered to the ICTY after an intervention by the Serbian Government. On March 23, Milomir Stakic, former mayor of the Bosnian town of Prijedor, arrived at The Hague following his arrest by Serbian police. Finally, on April 1, Mr. Milosevic was arrested in Belgrade, initially for violations of domestic law, including financial misdealings, causing damage to the Serbian economy and bringing instability to the country during the period of hyperinflation in the early 1990s.

Following the arrest of Mr. Milosevic, the Secretary of State made the required certification and determination. A statement from the Department of State accompanying the certification decision, set forth below, noted that the certification decision was qualified and that continued progress toward full cooperation with the International Criminal Tribunal for Yugoslavia was a precondition for United States support of an international donor’s conference.

The statement is available at [www.state.gov/r/pa/prs/ps/2001](http://www.state.gov/r/pa/prs/ps/2001).

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Today, April 2, the Secretary of State conveyed his decision to Congress on the issue of certification of the Federal Republic of Yugoslavia. The Secretary determined that Yugoslavia had met

the criteria of Section 594 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 2001. In making his determination, however, the Secretary qualified this certification. The Administration intends to continue to press Yugoslav authorities to follow through on their stated intention to cooperate fully with the International Criminal Tribunal for Yugoslavia. United States support for the holding of an international donors conference will depend on continued progress by Yugoslavia and Serbia toward full cooperation with the tribunal.

**a. Comments by President Bush**

Excerpts below from a statement by President Bush on April 1, 2001, welcoming the arrest of Mr. Milosevic made clear that delivering him to the ICTY for trial in The Hague remained a high priority for the United States.

The text of Mr. Bush's statement is available at [www.whitehouse.gov/news/releases/2001/04/20010401.html](http://www.whitehouse.gov/news/releases/2001/04/20010401.html).

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I welcome today's arrest of Slobodan Milosevic, the former President of Yugoslavia. His arrest represents an important step in bringing to a close the tragic era of his brutal dictatorship.

Milosevic was responsible for great suffering throughout the Balkan region. He deserves to be tried for his crimes against the Serbian people. He also deserves to be tried for violations of international law. We cannot and must not forget the chilling images of terrified women and children herded onto trains, emaciated prisoners interned behind barbed wire, and mass graves unearthed by UN investigators. Milosevic's arrest should be a first step toward trying him for the crimes against humanity with which he is charged. I am confident that Yugoslavia will continue down the path of cooperation with the UN War Crimes Tribunal. I am encouraged by the actions that Belgrade has already taken to work with the Tribunal, including its assistance over the last several weeks in transferring two indictees to the Hague. I call on President Kostunica to continue this cooperation and to see that Milosevic is likewise brought to justice. The United States appreciates the hard job that Yugoslavia faces in building its new democracy. I assure the Yugoslav government and people that

they can count on the friendship of the United States as they continue down the path of democratic and economic reform. We look forward to the day that Yugoslavia is fully part of a Europe that is whole and free and at peace.

***b. U.S. participation in donors' conference***

At the time of Mr. Milosevic's arrest in April, representatives of the FRY indicated that there could be no consideration of his transfer to The Hague until the Yugoslav government enacted a law on cooperation with the tribunal. This action had not been successfully completed in the days before the scheduled European Commission and World Bank Donors Conference for the Federal Republic of Yugoslavia in Brussels, set for June 29, 2001. On June 27, 2001 Secretary of State Colin Powell announced that the United States would participate in the donors' conference. Disbursement of U.S. assistance pledged at the conference, however, would be contingent upon further cooperation. The text of the press statement on the decision is available at [www.state.gov/r/pa/prs/ps/2001](http://www.state.gov/r/pa/prs/ps/2001).

On June 28 a government decree providing for cooperation with the Tribunal was declared unconstitutional by the Yugoslav Constitutional Court. In the evening of the same day, Prime Minister Zoran Djindjic of Serbia announced that he had acted, with the support of his cabinet, to override the Yugoslav ruling. The Serbian government had flown Milosevic to an American air base in Tuzla, Bosnia, and from there to a military airfield near The Hague. In amendments of October 8, 2001 and November 22, 2001, respectively, indictments were added against Milosevic for war crimes and crimes against humanity in Croatia and for genocide, war crimes and crimes against humanity in Bosnia and Herzegovina. Mr. Milosevic made his initial appearance before the ICTY on December 11, 2001, with trial scheduled to begin, on the Kosovo indictment only, on February 12, 2002.

### 3. International Criminal Court

#### a. *U.S. position on Rome Statute creating International Criminal Court*

On December 1, 2002, the United States explained its position on UN General Assembly Agenda Item 164, Establishment of the International Criminal Court, adopted by consensus on December 12, 2001.

The full text of Agenda Item 164 is available at [www.un.org](http://www.un.org).

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The United States will not participate in the adoption of the resolution on the establishment of the International Criminal Court. The United States has well-known objections about the International Criminal Court, including the Court's purported ability to exercise jurisdiction over nationals of non-parties; the inclusion of the crime of aggression within the Statute of the Court; and the possibility of politically motivated prosecutions. The United States believes, therefore, that it would be inappropriate to join consensus on this resolution.

#### b. *Crime of aggression*

On September 26, 2001, D. Stephen Mathias, Assistant Legal for United Nations Affairs, U.S. Department of State, presented the views of the United States on the crime of aggression, set forth below. His presentation was made at the ICC Preparatory Commission, Working Group on the Crime of Aggression, in New York concerning the ongoing effort to define the crime of aggression and establish the conditions for exercise over that crime by the International Criminal Court, as called for in Article 5 of the Rome Treaty.

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The United States appreciates the serious efforts made by the members of this Working Group to deal with the difficult questions before it and, in particular, the efforts made by the sponsors to identify and address some of the specific legal issues that

arise in defining aggression and seeking to establish the conditions under which the ICC would exercise jurisdiction with respect to an alleged crime of aggression. In what follows, I will not address every aspect of the current proposals before the Working Group, but will identify continuing issues of fundamental concern and vital interest to the United States with respect to the proposals. At an appropriate time, the United States may wish to supplement these observations with additional comments on the new proposals, including comments on the relationship of the text of paragraph 1 of the proposal on the definition of aggression with various articles of the Rome Statute and on specific intent. The United States notes that other proposals also remain before the Working Group and should continue to be the subject of consideration by the Working Group.

In our view, we cannot separate the conditions for the exercise of jurisdiction by the ICC from the definition of aggression. Recognition of the appropriate role of the Security Council is critical to progress with respect to either proposal.

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With respect to the proposal on a definition of aggression, we remain convinced that the definition of aggression for purposes of the ICC should reflect customary international law, and we are concerned that Paragraph 2 of the proposal does not conform to this requirement.

Paragraph 2 of the proposal is, of course, based on Article 2, paragraph 4, of the United Nations Charter and would define the crime of aggression by reference to part of the substantive content of that provision. Article 2, paragraph 4 of the Charter, however, does not define its scope as coterminous with that of aggression, which, as a representative recently reminded us, is itself not mentioned in article 2, paragraph 4. So the proposal as we understand it appears to merge two concepts—aggression on the one hand and the use of force against the territorial integrity or political independence of another State—which are distinct under the Charter.

It is not through inadvertence that the Charter maintains a distinction between these concepts. It reflects the fact that under customary international law not every use of force that is inconsistent with Article 2, paragraph 4 of the Charter would properly be found to constitute aggression. It was in recognition of this

fundamental precept that the Charter leaves it to the Security Council to determine the existence of an act of aggression, rather than establishing that every unlawful use of force would constitute aggression. Simply stated, customary international law reserves for the category of aggression a particular kind of use of force, characterized by sufficient gravity to merit that description.

Again, it is not by accident that this is so. Aggression, whether in the context of an act of aggression by a State or the commission of the crime of aggression by an individual, is not a description that should be lightly applied to the actions of one side or the other in, for example, a border skirmish or a fishery dispute. To do so would not only degrade the concept of aggression, but raise the risk of aggravating what may be a minor dispute and making it more difficult to resolve. While the Commentary attached to the proposal touches on this point and recognizes the need to distinguish between aggression and the use of force that is inconsistent with article 2, paragraph 4, of the Charter, the addition of the words “the use of armed force to attack,” while going in the right direction, does not bring the definition within the customary law parameters of Nuremberg and the corollary standards of the Tokyo trials. The London Charter’s reference to a “war of aggression” provides guidance on the customary law threshold that we must reflect in our work here.

Thus both customary law and sound reasons of international policy dictate that the crime of aggression be reserved for acts of a certain magnitude and not include all uses of force that are inconsistent with article 2, paragraph 4. We were encouraged that a number of delegations that have spoken on this proposal have agreed that the proposal must better reflect the customary international law “threshold” separating aggression from other unlawful uses of force. We do not agree with a number of delegations, however, that would seek to define aggression by means of an itemized list of examples of acts. Thus we would not agree that the definition should include reference to or inclusion of the list of acts set forth by the General Assembly in Article 3 of resolution 3314 (XXIX), a resolution which, as the sponsors have noted, was elaborated for purposes other than those of criminal responsibility and for other audiences.

Insofar as the conditions for the exercise of jurisdiction by the International Criminal Court are concerned, we are of the

view that this proposal, like its predecessor, raises profound issues of consistency with the Charter and the legitimate practices of States since the Charter's inception, and runs the risk of complicating the resolution of international disputes.

One of our colleagues has reviewed for us some of the relevant Charter provisions in this area, noting the role of the Security Council under, *inter alia*, articles 24 and 39 and the role of the General Assembly under, *inter alia*, articles 10 and 14. Our reading of these articles does not, however, lead us in the same direction as the sponsors of the current proposals. That article 24 refers to the "primary responsibility" of the Security Council for the maintenance of international peace and security and article 14 provides for a role for the General Assembly in recommending, subject to article 12, measures for the peaceful adjustment of any situation, does not in any way derogate from the exclusive function of the Security Council with respect to the determination of an act of aggression. The exclusive nature of this function is basic to the security regime established by the Charter, and fifty-six years of State practice under the Charter provide no basis for a view that a legally significant determination of the existence of an act of aggression may be established in any other manner. Such a determination, including an assessment of which State is responsible in the context of a dispute, is a complex matter. It highlights the wisdom of those who framed the Charter that they committed that function to the Security Council in article 39.

Of course, the General Assembly has a role under the Charter with respect to international peace and security, *i.e.*, to make recommendations for measures for the peaceful adjustment of any situation, a role that the International Court of Justice has acknowledged in the *Certain Expenses* case, but we believe that this role does not include making a determination about the existence of an act of aggression. Seeking an advisory opinion from the International Court of Justice on that subject would also inevitably encroach on the exclusive function of the Security Council. Neither the General Assembly nor the International Court of Justice may properly infringe upon the role given exclusively to the Security Council by the UN Charter.

The proposal that the General Assembly request an advisory opinion from the International Court of Justice in the event that the Security Council has not made a determination under article



39 of the Charter raises serious concerns. It was explained by one of our colleagues during our discussions here that it was important to distinguish for the purposes of our deliberations those issues bearing on the criminal responsibility of an individual, which would be the subject of a criminal proceeding before the ICC, and those issues bearing on State responsibility, which are related to the determination of whether an act of aggression has occurred. And it is precisely because the determination of the existence of an act of aggression is a matter that affects the responsibility of a particular State that it is inappropriate as a subject of a request for an advisory opinion. One would expect such an issue to be addressed only in a case arising under the Court's jurisdiction to hear contentious cases, of course, with the consent of the States concerned. Suppose, for example, that the Court, in an advisory opinion, determines that State A has committed an act of aggression. Would that finding be dispositive in a contentious case brought by State B, seeking reparation from State A? Is it conceivable that the Court could reach a different result in such a contentious case? Would it be appropriate, in any case, to attach consequences such as the possibility of an ICC prosecution to an advisory opinion of the Court, given its advisory character? One has moved out of the realm of advice when the determination of the Court would have an automatic consequence and would not be provided solely for the guidance of the requesting entity. The Commentary suggests that the advisory opinion would not bind the States affected *inter se*. But this may be, in my view, a narrow and unrealistic vision of an advisory opinion that would, at the very least, stigmatize a State as an aggressor.

Moreover, as the United States has suggested in earlier sessions of this Working Group, the proposal for the involvement of the International Court of Justice in determining the existence of an act of aggression through its advisory jurisdiction appears to us to risk politicizing the advisory process in a way that would be undesirable.

Ultimately, in our view, to maintain consistency with the Charter with respect to the crime of aggression admits of only one approach. Where the Security Council has determined the existence of an act of aggression under article 39, the exercise of jurisdiction by the ICC to determine the existence of a crime of aggression would be consistent with the Charter. Absent such a

determination by the Security Council, it would not be consistent with the Charter regime for the ICC to proceed with prosecution. This was the approach of the International Law Commission when it examined the issue, and it remains, in our submission, the only approach that is consistent with the Charter.

We are aware, of course, of the criticism that has been directed at such an approach. Some have suggested that the Security Council may find itself unable to make a determination of the existence of an act of aggression in a case in which such aggression may be clear, with the result that an individual who deserves to be tried for the crime of aggression may not be brought to justice. This is a serious concern. But it must be weighed against other serious concerns that any alternative approach would introduce. There may be excellent reasons for the Security Council not to make a determination of the existence of an act of aggression in a particular case; pressure on the General Assembly to request an advisory opinion on the existence of an act of aggression may obstruct, rather than promote, international objectives, including various mechanism that might be established by the Security Council, or facilitated by the Secretary-General, to maintain international peace and security. Recourse to the advisory process of the International Court of Justice for the purpose of finding an act of aggression may politicize the Court or compromise the role of the Court in contentious cases and thereby undermine its effectiveness. Ultimately, the legitimacy of any conviction flowing from a process that does not appear consistent with customary international law or with the Charter would be suspect.

### **Cross-references**

*References to International Criminal Court in UNCHR Resolutions, Chapters 6.G.2. and 6.G.4.*

*Extraterritoriality of U.S. federal arrest authority, Chapter 6.G.5.a(2).*

*Effect of Extradition Request under FSIA, Chapter 10.A.5.*

*Designation of terrorist organizations, Chapter 19.C.3.*

*New criminal law authorities under USA PATRIOT Act, Chapter 19.C.4.a*

## CHAPTER 4

# Treaties And Other International Agreements

### A. CAPACITY TO MAKE

#### 1. Role of Individual States of the United States

##### a. *Analysis of Memorandum of Understanding between Missouri and Manitoba*

On November 20, 2001, William H. Taft, IV, Legal Adviser of the U.S. Department of State, responded to a request by Senator Byron L. Dorgan of North Dakota for an analysis of a Memorandum of Understanding (MOU) signed by the State of Missouri and the Province of Manitoba. In his request, Senator Dorgan stated that from his perspective “the MOU raises a serious question about the propriety of such a memorandum of understanding given the constitutional limits on compacts between a state government and a foreign country.” Mr. Taft’s response explained that the Department of State had not been consulted prior to the signature of the MOU. A memorandum attached to the letter and set forth below described some of the considerations that the Department would have raised if it had been consulted.

The full texts of the letters between Senator Dorgan and Mr. Taft are available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

## Memorandum

This memorandum sets forth Department of State comments on the January 25, 2001 Memorandum of Understanding between the State of Missouri and the Province of Manitoba (“MOU”) in light of relevant provisions of the U.S. Constitution.

In the MOU, Missouri and Manitoba agree “to work cooperatively to the fullest extent possible consistent with law and existing treaties . . . in their efforts to oppose water transfers” between the Missouri River watershed (Missouri’s water supply) and the Hudson Bay watershed (Manitoba’s water supply).<sup>1</sup> The MOU includes commitments to exchange information; to mutually support opposition to inter-basin transfers, including related incremental works; and to communicate concerns about such transfers to their respective national governments.

There appear to be three constitutional doctrines implicated by the MOU: (a) the Compact Clause; (b) the Supremacy Clause by which federal law may preempt state action; and (c) the Foreign Affairs Power generally.

### The MOU and the Compact Clause

The question has been raised whether the MOU, given that it has not been approved by Congress, is consistent with the Compact Clause of the Constitution. Article 1, Section 10, Clause 3 of the Constitution provides that “[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . .” The Constitution does not specifically assign responsibility for interpretation or enforcement of this clause to the Executive branch of the federal government. In practice, however, it is not uncommon for states

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<sup>1</sup> We understand that the parties are concerned about the environmental and/or economic impact such transfers might have. *See, e.g.,* Terry Ganey, *Holden, Canadian Oppose Transfers of Missouri River Water; Officials Sign Deal Aimed at Protecting Supply, Environment, St. Louis Post-Dispatch*, January 31, 2001 at A7 (citing Canadian concern over environmental damage to Hudson Bay watershed from inter-basin transfers and Missouri interest in protecting its supply of water for drinking and recreational purposes).

of the United States to consult with the Department of State when they are considering entering into an arrangement with a foreign power for advice as to the consistency of that arrangement with the Compact Clause. In the first instance, responsibility for fidelity to the requirements of the Compact Clause lies with the states themselves, pursuant to the Supremacy Clause of the Constitution. Should they submit a proposed compact to the Congress, it is the prerogative of the Congress to approve or disapprove the compact, or to require modifications. Ultimately, issues concerning the Compact Clause or a particular arrangement by a state with a foreign power may need to be resolved in the courts, either state or federal.

The Department of State has not been consulted by the state authorities of either North Dakota or Missouri concerning the MOU at issue here, and thus is not aware of whether there is an intention to bring the MOU before the Congress or the courts. However, in accordance with the Department's normal practice, this memorandum identifies the kinds of considerations that the Department would raise about an MOU like this.

### The Scope of the Compact Clause

The Department ordinarily looks to *Virginia v. Tennessee*, 148 U.S. 503 (1893), in assessing whether an agreement involving a U.S. state would constitute a "Compact . . . with a foreign Power," although that case did not involve a compact with a foreign power.<sup>2</sup> The only Supreme Court case actually to review a potential state compact with a foreign power, *Holmes v. Jennison*, resulted in a divided court.<sup>3</sup> The case involved the question of whether the Governor of Vermont had entered into an agreement

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<sup>2</sup> There is, in fact, little historical evidence of the intended scope of the Compact Clause. See Felix Frankfurter and James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments* 34 YALE L.J. 685, 694 (1925) (finding a lack of attention to the Compact Clause in the records of the Constitutional Convention and the Federalist Papers); see also Abraham C. Weinfeld, "What did the Framers of the Federal Constitution Mean by 'Agreements or Compacts'?" 3 U. CHI. L. REV. 453 (1936).

<sup>3</sup> See 39 U.S. 540, 560 (1840)

with Canadian authorities to extradite a fugitive back to Canada. Chief Justice Taney, speaking for three other justices, took the view that “every agreement, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties” falls within the Compact Clause’s ambit.<sup>4</sup> Taney was particularly concerned about the ability of a U.S. state to extradite fugitives to a country when it was the policy of the federal government not to extradite persons.<sup>5</sup> In Taney’s view, the only permissible way for Vermont to make such a hand-over would be if Congress consented, since that would make the agreement subject to federal supervision.<sup>6</sup> In contrast, the other justices found either that the Supreme Court had no jurisdiction to hear the case or that no agreement could be inferred.<sup>7</sup>

In general, the notion articulated by Chief Justice Taney that all U.S. state agreements constitute compacts that require congressional consent has not been widely supported. In *Virginia v. Tennessee*, the Supreme Court, in reviewing an interstate compact delineating a boundary line, concluded that despite the Constitution’s general language, its prohibition on compacts without congressional consent was not absolute.<sup>8</sup> Specifically, the Court reasoned the Clause should only extend to those compacts

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<sup>4</sup> *Id.* at 572.

<sup>5</sup> *Id.* at 574. At the time, the United States was renegotiating its extradition treaty with Great Britain, which was responsible for Canada’s foreign relations, and had a policy of refusing to surrender persons. *Id.* at 561–62.

<sup>6</sup> *Id.* at 578–79.

<sup>7</sup> See, e.g., *Holmes v. Jennison*, 39 U.S. at 579–86 (opinion of Justice Thompson concluding the Court lacked jurisdiction under § 25 of the Judiciary Act); *id.* at 594–598 (opinion of Justice Catron noting, in course of finding no jurisdiction under § 25 of the Judiciary Act, alarm over reading the intent to surrender Holmes to Canadian officials as an “agreement”).

<sup>8</sup> 148 U.S. at 519. The case involved a request by Virginia to set aside as unconstitutional a boundary line compact it had concluded in 1803 since it was entered into without congressional consent. *Id.* at 517. Although the Court stated that the constitutional term “compact” could not apply to every possible compact between one U.S. state and another for the purposes of requiring congressional consent, such consent in the case of the 1803 compact could be “fairly implied” in light of subsequent legislation and proceedings relating to judicial, revenue and federal elections law issues. *Id.* at 521–22.

that involved “the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.”<sup>9</sup> Subsequent Supreme Court case law has affirmed that, at least with respect to interstate compacts, only compacts that would increase the political power of the states in such a way as to interfere with the supremacy of the federal government require congressional consent.<sup>10</sup>

Although it is not a settled question that the *Virginia* standard applies to state compacts with foreign powers, at least one state court, the Department of State and numerous scholars have assumed that it does.<sup>11</sup> In *McHenry County v. Brady*, the Supreme Court of North Dakota declined to enjoin construction and maintenance of a drain from North Dakota into Canada called for by a contract between U.S. and Canadian municipal entities as a violation of the Compact Clause.<sup>12</sup> In so ruling, the court declined to adopt the “sweeping language” of *Jennison* since the subject matter of that case (extradition) involved a national power, and instead relied on *Virginia* and its progeny in light of the local context in which the contract was concluded.<sup>13</sup> In a similar 1981 case regarding a proposed international water district involving areas of both Vermont and Quebec, the Department of State took the view that such an arrangement did not implicate the Compact

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<sup>9</sup> *Id.* at 519.

<sup>10</sup> See, e.g., *Northeast Bancorp, Inc. v. Board of Governors of the Federal Reserve System*, 472 U.S. 159 (1985) (finding no compact nor any impact on U.S. federal structure where New England state banking deregulation statutes complied with a federal banking statute, the Douglas Amendment); *United States Steel Corporation v. Multistate Tax Commission*, 434 U.S. 452 (1978) (reasoning that since the compact did not authorize member states to exercise powers that they could not exercise in the absence of the compact, there was no enhancement of state power in relation to the federal government).

<sup>11</sup> See, e.g., Louis Henkin, *Foreign Affairs and the U.S. Constitution* 155 (2d. ed. 1996); Raymond Rodgers, *The Capacity of States of the Union to Conclude International Agreements: The Background and Some Recent Developments*, 61 AM. J. INT'L L. 1021, 1023 (1967).

<sup>12</sup> 37 N.D. 59 (1917).

<sup>13</sup> *Id.* at 78. The Court went on to conclude that the drainage construction was consistent with the relevant provisions of the 1909 U.S.-Canada Boundary Waters Treaty. *Id.* at 80.

Clause because federal permitting procedures would still apply and the district's activities would be limited to traditionally local functions (e.g., water service) rather than political functions.<sup>14</sup>

In practice, Congress has been asked to consent to only a few foreign compacts involving U.S. states, leaving uncertain Congress' view of the scope of the Compact Clause. However, we are aware of no compacts approved by the Congress that involved local interference with national policy. Among the most well-known examples of congressionally-approved compacts are a 1956 New York-Canada agreement to establish a port authority for a bridge across the Niagara river; a 1958 Minnesota-Manitoba highway agreement; 1949 and 1952 Northeastern Interstate Forest Fire Protection Compacts; and various compacts authorized under the 1972 International Bridge Act.<sup>15</sup> In one case involving water rights, Congress consented in 1968 to a Great Lakes Basin Compact.<sup>16</sup> Originally intended to include all U.S. states and Canadian provinces bordering the Great Lakes, the compact was to establish a Commission with the goal of promoting the use, development and conservation of the water resources of the Great Lakes. In giving its consent, however, Congress refused to approve certain compact provisions, including those that allowed Canadian provinces to join as members, in light of Department of State concerns about such participation and the potential overlap between the compact and the mechanisms established under the 1909 U.S.-Canadian Boundary Waters Treaty.<sup>17</sup>

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<sup>14</sup> In a later case, involving a June 23, 1990 *Preliminary Agreement to Develop and Implement a Trade Development Initiative between Indiana's Department of Commerce and the All-Union Academy of Agricultural Sciences and the Ukrainian Association of Consumer Goods Exporters*, the Legal Adviser's office took a similar stance, making no objection to the Preliminary Agreement where it focused on facilitating the traditionally local function of enhancing trade and commercial opportunity for state industry abroad without undertaking functions of a political nature.

<sup>15</sup> 33 U.S.C. § 535a. For more details about the other examples, see Kevin J. Heron, *The Interstate Compact in Transition: From Cooperative State Action to Congressionally Coerced Agreements*, 60 ST. J. L. REV. 1 (1985). See also Peter R. Jennetten, *State Environmental Agreements with Foreign Powers: The Compact Clause and the Foreign Affairs Power of the States*, 8 GEO. INT'L ENV. L. REV. 141 (1995).

<sup>16</sup> See P.L. 90-419, 82 Stat. 414 (July 24, 1968).

<sup>17</sup> *Id.*; see also *Treaty between the United States and Great Britain*



At the same time, the Department of State is aware that U.S. states often conclude various arrangements with foreign powers without congressional consent. It appears that such arrangements principally involve matters of common local interest, e.g., coordination on roads, police cooperation, border control, local trade cooperation initiatives, education exchanges, local conservation measures, and similar matters. When they are called to the Department's attention, such arrangements have generally been analyzed under the *Virginia* standard, with particular attention to whether such texts would interfere with the President's foreign relations responsibilities.

### The MOU and the Compact Clause

Turning to the MOU, it appears that two questions need to be asked to determine whether it triggers the Compact Clause's requirement for congressional approval. First, is the MOU a "compact or agreement" for constitutional purposes? Second, if so, does it belong to that class of agreements that the Supreme Court has determined require congressional consent?

As for the first question, to qualify as a "compact or agreement" the Department traditionally has looked to whether the text in question is intended to be legally binding.<sup>18</sup> The form and

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*Relating to Boundary Waters Between the United States and Canada*, done at Washington January 11, 1909, TS 548 ("Boundary Waters Treaty"). In a recent development, in December 2000, Congress amended the U.S. Water Redevelopment Act of 1986, 42 U.S.C. § 1926d-20, to "encourage the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin." In doing so, however, Congress indicated that it was not approving in advance any agreement reached by the Great Lakes States with Ontario and Quebec. *See* 105 Cong. Rec. S11406 (Oct. 31, 2000) (expressing views of Senators Baucus, Levin and Smith that 42 U.S.C. § 1962d-20(b)(2) should not "be interpreted as granting pre-approval to standards which have not yet been developed and which Congress has not reviewed").

<sup>18</sup> This approach is derived from the treatment generally accorded to interstate compacts. In *Northeast Bancorp*, the Supreme Court concluded

the content of this MOU suggest that Missouri and Manitoba likely intended to conclude such a legal agreement. The MOU is structured as an agreement with a title, preamble, specific commitments and a signature block. The terminology used (e.g., “agree” and “ensure”) is consistent with a legally binding intent. A Missouri Department of Natural Resources Press Release calls the MOU an “historic agreement” that “commits both jurisdictions to working together to oppose water transfers between major watersheds.”<sup>19</sup> Upon signing, Manitoba Premier Doer indicated that “today’s signing of this MOU commits both of our jurisdictions to work together to oppose any efforts that may result in the transfer of water between watersheds.”<sup>20</sup> The two sides have also convened an inaugural meeting under the MOU to discuss their concerns over potential inter-basin water transfers.<sup>21</sup>

The fact that the two parties condition their cooperation on existing law and treaties does not preclude a finding that the MOU is intended to be legally binding. The United States has concluded

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that the state statutes in question did not constitute a compact in part because “each State is free to modify or repeal its law unilaterally.” 472 U.S. at 175; *see also Multistate Taxation Commission*, 434 U.S. at 473 (discussing how states are not bound by Commission rules and regulations or to participate in the Commission for any length of time); 4B U.S. Op. Off. Legal Counsel 828 (1980) (OLC opinion reviewing federal-state and state-state arrangements under the Water Resources Planning Act and finding that congressional “[c]onsent is required only when two or more states agree among themselves to impose some legal obligation or disability on state or federal governments or private parties.”). There does not, however, appear to be an established position on whether state compacts with foreign powers need to be legally binding. The Department has not ruled out the possibility that a political arrangement touching on matters of important national interest would also constitute a compact for constitutional purposes.

<sup>19</sup> Missouri Department of Natural Resources, News Release No. 185, Feb. 2, 2001.

<sup>20</sup> Manitoba Government News Release, January 25, 2001; *see also Doer’s Anti-Diversion Efforts Irk Dorgan*, *The Canadian Press*, February 24, 2001 (quoting Premier Doer’s response to Senator Dorgan’s hostility to the MOU: “This shows how important this Missouri agreement is . . . [t]he Missouri Agreement gives us some heft in the United States to deal with these diversion projects, as opposed to being off on our own in Canada”).

<sup>21</sup> *See* Missouri Department of Natural Resources News Release No. 215, March 9, 2001.

a number of treaties and other international agreements in which a particular provision or the agreement as a whole is subject to the parties' laws or international commitments.<sup>22</sup> In such circumstances, although the parties can avoid their obligations based on an existing law or treaty, they may not avoid such obligations simply because, from a policy perspective, they no longer desire to comply with them.

Ultimately, however, the legal status of an instrument such as the MOU may not itself be determinative of whether the document qualifies as a compact. As the Supreme Court reasoned in *U.S. Steel Corp.* "the mere form of the interstate agreement cannot be dispositive."<sup>23</sup> In other words, even in the absence of a legally binding agreement, the Compact Clause may be implicated. In *Northeast Bancorp., Inc.*, for example, the Court undertook a Compact Clause analysis of reciprocal state banking legislation even where there was no evidence of a legal agreement between the states to enact such legislation. Instead, the Court looked for "several of the classic indicia" of a Compact: e.g., establishment of a joint organization or a body; some restriction on the state's ability to withdraw from the arrangement by repealing or modifying its law unilaterally; or a requirement that limi-

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<sup>22</sup> See, e.g., *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, done at Paris, December 17, 1997 (Art. 9) (Parties agree "to the fullest extent possible under its laws and relevant treaties" to "provide prompt and effective legal assistance to another Party"); *Inter-American Convention Against Corruption*, March 29, 1996 (Article XIV) ("In accordance with their domestic laws and applicable treaties, the States Parties shall afford one another the widest measure of mutual assistance. . ."); see also *Agreement between the United States of America and the Government of Japan Regarding Mutual Assistance Between Customs Administrations*, done at Washington, June 17, 1997 (Art. 2(2)); *Agreement between the United States of America and the Government of Canada regarding the Application of their Competition and Deceptive Marketing Practices Laws*, done at Washington and Ottawa August 1 and 3, 1995 (Article XI).

<sup>23</sup> 434 U.S. at 470 (citing with approval *Holmes v. Jennison*, 39 U.S. at 573 ("Can it be supposed that the constitutionality of the act depends on the mere form of the agreement? We think not. The Constitution looked to the essence and substance of things, and not to mere form. It would be but an evasion of the Constitution to place the question upon the formality with which the agreement is made.")).

tations on state action are reciprocal.<sup>24</sup> Although these factors seem particularly relevant where a court has to determine if independent state statutes constitute a compact, the Court has not to our knowledge addressed whether such indicia are also required where in fact a legal agreement exists. At a minimum, however, assuming that the same indicia applicable to interstate compacts apply to state compacts with foreign powers, these indicia are useful in evaluating the MOU.

Whether the “indicia” cited in *Northeast Bancorp, Inc.* are present in the MOU is not immediately apparent.<sup>25</sup> Missouri and Manitoba have had at least one meeting “under” the MOU, but it is not clear if such meetings would constitute the “joint organization” referred to by the Supreme Court. Another question is whether Manitoba could argue that Missouri had violated the MOU if Missouri announced that it supported inter-basin water transfers (à la a repeal in legislation). Similarly, *Northeast Bancorp, Inc.* would ask whether the obligation of Missouri to cooperate in opposing inter-basin water-transfers is contingent on Manitoba’s performance of similar obligations.<sup>26</sup> Firm answers to such questions would require further factual development of what actions the parties understood as being required by their agreement “to work cooperatively to the fullest possible extent consistent with law and existing treaties . . . to oppose [inter-basin] water transfers.”

Assuming for purposes of analysis that the MOU constitutes a “compact or agreement,” the next question is whether it is the sort of compact or agreement for which congressional consent is required. As stated above, the Department traditionally applies

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<sup>24</sup> 472 U.S. at 175 (finding no evidence of the classic indicia in the state banking statutes under consideration).

<sup>25</sup> The reasoning of the *Northeast Bancorp, Inc.* Court only discusses “several of the classic indicia of a compact” that were missing from the banking statutes in question; the Court, therefore, did not include an exhaustive list of such indicia. *See id.* Presumably, therefore, there are additional criteria that may be used in assessing whether a compact exists.

<sup>26</sup> In appropriate cases, it may also be desirable to consult with the national authorities of the foreign entity concluding an arrangement with a state of the United States. Just as there may be constitutional limitations here, a foreign subnational entity—including provincial governments in Canada—may not have competence to enter into an international arrangement without approval from their national government.

the standard laid out in *Virginia*—i.e., whether a compact is “directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States.” Evidence of an actual impact on the federal government’s supremacy has traditionally not been required; it is the potential impact of the compact that has led the Department to point out the need for congressional consent.<sup>27</sup>

Examining the MOU in light of *Virginia* and its progeny, the Department would look to whether the MOU (a) impacts other U.S. states; (b) interferes with the federal government’s interests in inter-basin water transfers; (c) deals solely with local matters; or (d) involves activities that could be carried out by Missouri even in the absence of the MOU. The following discussion briefly reviews each of these factors.

First, with respect to effects on other states, the water in the Missouri and Hudson Bay watersheds that is the subject of the MOU borders or supplies water for numerous states. Missouri and Manitoba are therefore not the only parties interested in how those watersheds are treated. Missouri’s alliance with Manitoba to support each other’s effort to oppose inter-basin water transfers could affect the interests of other states both as to the outcome and the process leading to decisions on how these waters are managed.

Second, in terms of the federal government’s role, Congress has indicated an express interest in the inter-basin transfers at issue in the MOU. Two statutes—the Dakota Waters Resources Act of 2000 (“DWRA”),<sup>28</sup> which amended the Garrison Diversion Reformulation Act of 1986 (“Garrison Act”)<sup>29</sup> and the Garrison Act itself—address inter-basin water transfers directly. Pursuant to authorities in the Garrison Act, as amended, the Department

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<sup>27</sup> See *Multistate Tax Commission*, 434 U.S. at 452 (agreeing that the “pertinent inquiry is one of potential rather than actual, impact upon federal supremacy”).

<sup>28</sup> See P.L. 106–554 (2000).

<sup>29</sup> See P.L. 99–294 (1986). Although no mention is made of the Garrison Act, the MOU’s preamble does refer to the DWRA: “Whereas, the Dakota Water Resources Act contains language that contemplates the possible large-scale diversion of water from the Missouri to the Hudson Bay watershed. . . .”

of Interior, in consultation with the Department of State, recently approved construction of a relatively small-scale endeavor, the Northwest Area Water Supply (“NAWS”) project, which will result in transfers of water from the Missouri River watershed to the Hudson Bay watershed. In addition, the DWRA contemplates a potential future authorization of transfers between these watersheds on a larger scale. The DWRA provides a comprehensive set of procedures for the Secretary of the Interior to follow in order to study and possibly construct projects involving inter-basin transfers in the Red River Valley (part of the Hudson Bay watershed), with both federal and state involvement in the review process.<sup>30</sup> Ultimately, the DWRA reserves to Congress the final decision on whether a transfer will be authorized,<sup>31</sup> but any such transfers are limited to those that the Executive branch determines comport with the 1909 U.S.-Canada Boundary Waters Treaty’s restrictions on activities that might pollute or otherwise affect the level or flow of boundary waters.<sup>32</sup>

Given such federal interest, application of the *Virginia* standard would require an analysis of whether the MOU encroaches on the political power of the federal government to address inter-basin water-transfers.<sup>33</sup> It is not enough to show simply that the

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<sup>30</sup> DWRA § 608(b) (amending Garrison Act § 8(c)). The DWRA requires the Secretary of the Interior to prepare a report for Congress studying the Red River Valley’s water needs. In conducting the study, the Secretary is required to solicit the input of gubernatorial designees from states that may be affected by various possible options and the effect of an out-of-basin option (i.e., inter-basin water transfers) on such states. In addition, within 1 year of the DWRA’s enactment (or later, in which case the reason for delay must be given), the Secretary of the Interior and the state of North Dakota are required to jointly prepare a draft environmental impact statement concerning all feasible options for meeting the comprehensive water quality and quantity needs of the Red River Valley, *including* the delivery of Missouri River water to the Red River Valley. *Id.*

<sup>31</sup> *Id.* (amending Garrison Act § 8(a)). If, however, the selected project involves only in-basin sources of water to meet the water needs of the Red River Valley, the Secretary is authorized to proceed with the project using the appropriated funds (approximately \$40.5 million) without further Act of Congress. *Id.*

<sup>32</sup> *Id.* (amending Garrison Act § 8(a)).

<sup>33</sup> See *Multistate Tax Commission*, 434 U.S. at 473 (“the test is whether the Compact enhances state power *quoad* the National Government.”).

federal government has competence over these matters. Rather, one must ask whether Missouri's enlistment of Manitoba's support in the MOU to oppose particular transfers potentially operates to the legal detriment of the federal government by interfering with the decision-making scheme set out in the federal legislation or, where decisions have been made, in their effective implementation. A secondary question is whether the MOU could interfere with administration of the Boundary Waters Treaty. That Treaty affords the United States and Canada, not Missouri or Manitoba, the rights to interpret and apply the Treaty as well as to refer matters to the International Joint Commission.<sup>34</sup>

As indicated above, a third factor the Department would customarily examine is the question of whether the MOU deals only with matters of local policy. Some state arrangements with foreign powers dealing with water use issues have been deemed to be solely of local interest for Compact Clause purposes. This was true of the drainage basin at issue in *McHenry County* and the Vermont-Quebec International Water District, which had "no political function." The MOU in this case, in contrast, addresses cooperation between a U.S. state and a Canadian province to work together to oppose the possibility of inter-basin water transfers that could affect other states of the United States and which are to be considered pursuant to federal statute.

Fourth, the Department would assess the implications of the Supreme Court's decision in *Multistate Tax Commission*, which highlighted that congressional consent to an interstate compact is not required so long as the state is free to undertake the contemplated activities in the absence of the MOU, on a proposed arrangement.<sup>35</sup> Thus, if one could show in this case that activities contemplated under the MOU—i.e., sharing information on

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<sup>34</sup> When U.S. states and Canadian provinces sought a more direct role in treaty negotiations involving the Great Lakes Water Basin, Congress rejected such a role. With respect to NAWs, the Secretary of the Interior, in consultation with the Secretary of State, made a finding in January 2001 that the proposed inter-basin water transfers were consistent with the Boundary Waters Treaty.

<sup>35</sup> See *Multistate Tax Commission*, 434 U.S. at 473 (concluding that the Commission Compact did not require congressional consent where "[t]his pact does not purport to authorize member States to exercise any powers they could not exercise in its absence")

actions contemplated under the DWRA, opposing inter-basin water transfers and communicating concerns about such transfers to the federal government—are actions that Missouri has the authority to carry out irrespective of an MOU, it would argue against applying the Compact Clause.

A key inquiry for this purpose is the extent to which the MOU calls for “mutually supportive” cooperation which might be understood as cooperation that cannot occur without another party. This would pose two issues: first, the extent to which such activities are possible even in the absence of the MOU, and secondly, whether this kind of activity impinges upon the “exclusive foreign relations power expressly reserved to the federal government,” and therefore falls outside the *Multistate Tax Commission* authorization for interstate compacts to be concluded without Congressional approval.<sup>36</sup>

Finally, in addition to these four factors, evidence of agreement on concrete actions by the parties undertaken pursuant to the MOU could assist in ascertaining whether the MOU impacts our federal structure. The MOU, however, is not so specific as to require either party to cooperate in ways that must physically manifest themselves (i.e., constructing a facility, etc.) nor does it appear to require them to enact any reciprocal obligations into law. This is presumably because the object and purpose of the MOU seems to be to commit Missouri and Manitoba to oppose the actions of others; i.e., to oppose what the federal government is studying, and in some cases, doing, with respect to inter-basin water transfers. Thus, any interference that the MOU might cause to the federal government’s supremacy would likely be procedural rather than substantive in nature. For example, if the MOU requires Missouri to operate not only on its own behalf, but also on Manitoba’s behalf, in attempting to influence federal water management policy, would that interfere with the federal gov-

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<sup>36</sup> *Id.* at 465, n. 15 (“Mr. Chief Justice Taney’s opinion in *Jennison* is not inconsistent with the rule of *Virginia v. Tennessee*. At some length, Taney emphasized that the State was exercising power to extradite persons sought for crimes in other countries, which was part of the exclusive foreign relations power expressly reserved to the federal government. He concluded therefore that the State’s agreement would be constitutional only if made under the supervision of the United States.”).



ernment's ability to implement the DWRA, the Garrison Act and the 1909 Boundary Waters Treaty? As discussed, below, in the event Missouri sought to undertake concrete actions with respect to such water management issues, a strong argument can be made that such actions would be pre-empted by the DWRA, the Garrison Act, and the 1909 Boundary Waters Treaty.<sup>37</sup>

Because of the expressions of federal policy, in addition to Compact Clause considerations, the MOU also potentially implicates the more general constitutional issues of federal preemption and the foreign affairs powers of the federal government. This memorandum therefore provides some additional background on these separate constitutional issues.

### The MOU, the Supremacy Clause and the Foreign Affairs Power

The Supreme Court decision in *Crosby v. National Foreign Trade Council* illustrates the Court's most recent views on federal preemption in a foreign affairs context.<sup>38</sup> In *Crosby*, the Court held unanimously that a Massachusetts law imposing sanctions on Burma was invalid under the Supremacy Clause of the Constitution "owing to its threat of frustrating federal statutory objectives."<sup>39</sup> In so holding, the Court concluded that a state law must yield to a congressional Act if Congress intends to occupy the field, even if the federal statute does not contain an express preemption provision. The Court did not base its holding on the federal government's exclusive constitutional responsibility for foreign affairs, but it did reason that preemption was appropriate in part based on the state law's disruption of the federal government's ability to speak with one voice to foreign nations.

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<sup>37</sup> See *Northeast Bancorp, Inc.*, 472 U.S. at 176 ("[t]o the extent that the state statutes might conflict in a particular situation with other federal statutes . . . they would be preempted by those statutes, and therefore any Compact Clause argument would be academic").

<sup>38</sup> 530 U.S. 363 (2000).

<sup>39</sup> *Id.* at 366. Under Article VI of the Constitution, the laws of the United States are "the supreme law of the Land ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2.

The Massachusetts law that was the subject of *Crosby* was enacted three months prior to a federal statute imposing mandatory and conditional sanctions on Burma. The Court found that the federal statute and the state law at issue had a common goal (economic sanctions against Burma based on its human rights record) and evidence was presented that it would not necessarily have been impossible for companies to comply with both the federal and state laws. But the Court found that the means employed by the Commonwealth of Massachusetts were in conflict with those in the federal Act insofar as they were different and distinct from those prescribed by the federal statute, and that the common end did not neutralize the conflicting means. According to the Court, the fact that companies might have been able to comply with both sets of sanctions did not mean that the state Act was compatible with the federal Act, which gave maximum discretion to the President to calibrate the appropriate level of U.S. sanctions.<sup>40</sup>

In examining the issue, the Court emphasized that “[i]t is simply implausible that Congress would have gone to such lengths to empower the President had it been willing to compromise the effectiveness by deference to every provision of state statute or local ordinance that might, if enforced, blunt the consequences of discretionary Presidential action.”<sup>41</sup> Referring to the foreign affairs context of the statute,<sup>42</sup> the Court also stressed that Massachusetts’ independent actions threatened the ability of the United States to speak effectively with one voice on the international plane, noting that “the President’s maximum power to persuade rests on his capacity to bargain for the benefits of access to the entire national economy without exception for enclaves fenced off willy-nilly by inconsistent political tactics.”<sup>43</sup>

As far as the Department is aware the courts have not had occasion to consider the applicability of these principles to a state agreement with a foreign power, rather than a state statute. It

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<sup>40</sup> *Id.* at 379 (citations omitted).

<sup>41</sup> *Id.* at 376.

<sup>42</sup> *Cf. Allen-Bradley Local No. 1111 v. Wisconsin Employment Relations Bd.*, 315 U.S. 740, 749 (1942); *Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 (1988).

<sup>43</sup> *Crosby*, 530 U.S. at 381.

would seem, however, that the logic of *Crosby* would prohibit states from accomplishing, via agreement with foreign states, what they are not able to accomplish by their own statutes. Therefore, it would appear relevant to assess the MOU's operation in light of federal preemption principles.

The central issue would be the MOU's compatibility with the federal statutory scheme for addressing the inter-basin water issues covered by the MOU. The NAWs project, for example, will involve such a transfer and has already been approved by the federal government in accordance with the terms of the Garrison Act. As for the DWRA, it is as comprehensive, if not more so, than the federal sanctions at issue in *Crosby*. Under the DWRA, the Secretary of Interior is charged with preparing a comprehensive report for Congress studying the Red River Valley's water needs and options for fulfilling them. The Secretary is required to solicit input from states that may be impacted by possible options. Environmental impact assessments of all feasible options are mandated by the statute. Within this statutory scheme, the Secretary of Interior is given some responsibility for selecting among potential projects, with the notable exception that any project that would require transfer of water from the Missouri River or its tributaries must be submitted to Congress for specific approval by an Act of Congress.

Given this comprehensive scheme, it is plain that Congress intended, in enacting the DWRA, to ensure that the decision making process about water allocation to the Red River Valley be centrally coordinated at the federal level. State input is recognized by the DWRA as an important piece of the process, but it is clearly subsumed into a federal decision-making process that reserves all final decision-making authority to the federal government. Indeed it seems that one of Congress' objectives was to reserve certain decisions not only to the federal government but to Congress' power alone. In general, even where it does not reserve exclusive decision-making power for Congress, it is clear that the DWRA makes the issue of supply to the Red River Valley one of federal concern. The statutory scheme represents not merely a solution for a subset of issues related to the water needs of the Red River Valley, or a plan for addressing some specific geographic area representing part of the Red River Valley, but rather a complete plan

for a federal approach to the total problem. As such, the statute appears to be designed to “occupy the field” when it comes to major decisions impacting certain water resources across several states.

Analogizing to the logic in *Crosby*, it is difficult to believe that Congress would have enacted the DWRA “had it been willing to compromise the effectiveness by deference to every provision of state statute or local ordinance” that might, if enforced, interfere with the overall purpose of the scheme.<sup>44</sup> Any concrete actions by Missouri to oppose inter-basin water transfers outside of this scheme would likely be preempted in that they would interfere with federal policies and programs. On the other hand, Missouri is not precluded from expressing its own viewpoint on the resolution of federal water management issues; to the contrary, the DWRA explicitly allows Missouri such a role. Thus, the question under *Crosby* is whether through the MOU Missouri is seeking to afford a surrogate voice for Manitoba in the federal government’s decision-making and implementation processes that would interfere with the scheme envisioned by Congress.<sup>45</sup>

Besides such principles of federal preemption, the courts have also confirmed the exclusive assignment of foreign affairs responsibilities to the federal government under the U.S. Constitution. Although the Court in *Crosby* did not reach the question of whether the Massachusetts statute unconstitutionally interfered in foreign affairs, both the district court and the appeals court held that it did, based on the decision by the Supreme Court in *Zschemnig v. Miller*.<sup>46</sup> The appellate court opined that “*Zschemnig*

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<sup>44</sup> See *id.* at 376.

<sup>45</sup> The Court has also said that when a state legislates in an area “that touch[es] international relations,” the Court should be “more ready to conclude that a federal Act . . . supersede[s] state regulation.” *Allen-Bradley Local No. 1111*, 315 U.S. at 749. This raises the question of whether Missouri’s cooperation and information sharing with Manitoba under the MOU constitutes a line of communication with a foreign power separate from that maintained by the United States, potentially impairing the ability of the United States and Canada to deal with each other diplomatically about comprehensive approaches to these issues.

<sup>46</sup> *Zschemnig v. Miller*, 389 U.S. 429 (1968). *Zschemnig* involved a state probate law that prevented the distribution of an estate to a foreign heir if the proceeds of the estate were subject to confiscation by the decedent’s government. *Id.* at 435. The Court overturned the law on the ground

stands for the principle that there is a threshold level of involvement in and impact on foreign affairs which the states may not exceed.”<sup>47</sup> The court held that while the boundaries of *Zschernig* were unclear, the Massachusetts law was clearly inconsistent with the principle in *Zschernig*. The court rejected arguments by Massachusetts to the effect that courts must balance the interests in a unified foreign policy against the particular interests of an individual state. Rather, quoting from *Zschernig*, the court reiterated that “[state] regulations must give way if they impair the effective exercise of the nation’s foreign policy.”<sup>48</sup> A similar ruling was recently issued by the U.S. District Court for the Northern District of California.<sup>49</sup> In that case, the Court found *Zschernig* applicable where a state was conducting its own foreign policy.<sup>50</sup>

Thus, depending on the extent of its actual interference with U.S. foreign policy efforts in managing the water resources of the Hudson Bay watershed shared with Canada, the Missouri-Manitoba MOU would need to be evaluated for whether it constitutes an unconstitutional disruption of the federal government’s foreign affairs power.

## Conclusion

In light of the DWRA, the Garrison Act, the Boundary Waters Treaty and relevant practice, the Missouri-Manitoba MOU poten-

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that such statutes had “a great potential for disruption or embarrassment” of the United States in the international arena in that they called for state officials to inquire into the status of foreign law and the credibility of foreign officials. *See id.* at 435.

<sup>47</sup> *National Foreign Trade Council v. Natsios*, 181 F.3d 38, 52 (1st Cir. 1999).

<sup>48</sup> *Id.*; *Zschernig v. Miller*, 389 US at 440–41.

<sup>49</sup> *See In Re World War II Era Japanese Forced Labor Litigation*, No. MDL-1347 (N.D. Cal., September 17, 2001) (citing *Zschernig* for the proposition that the Constitution prohibits state action that unduly interferes with the federal government’s authority over foreign affairs).

<sup>50</sup> *See id.* at 22–23 (examining whether a California statute affording individuals from any country a right to recover compensation for their forced labor by the Japanese government or Japanese companies during World War II embraces a “foreign policy purpose” with the intent of influencing foreign affairs directly).

tially implicates several constitutional doctrines. First, if the MOU is intended to be an instrument that could interfere with the just supremacy of the federal government, issues are raised as to the necessity for congressional consent under the Compact Clause. Given Congress's occupation of the field of inter-basin water transfers by statute (e.g., the DWRA), there are further issues under *Crosby* which set out the standards for determining when a state statute is preempted under the Supremacy Clause. Finally, to the extent the MOU may potentially interfere with the foreign affairs power more generally it would need to be evaluated for its consistency with principles set out in *Zschernig*.

***b. Proposed annex to Great Lakes Charter***

On June 15, 2001, Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, provided comments on a proposed Great Lakes Charter Annex forwarded for his review by the Great Lakes Council of Governors. The letter raised two concerns, as set forth in the excerpts below.

The full text of the letter is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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Thank you for forwarding a copy of the proposed Great Lakes Charter Annex 2001, which I understand is intended to supplement the Great Lakes Charter of 1985. The Department of State shares your view of the importance of conservation of Great Lakes water and supports coordinated efforts in this area. As the Great Lakes States and Canadian Provinces move forward to develop and implement a resource-based conservation standard for new water withdrawal proposals from the Great Lakes Basin, the Department would expect such efforts to be within the competence of States and Provinces within their respective federal systems, and consistent with the treaty commitments of the United States and Canada, including the Boundary Waters Treaty of 1909, as well as State, Provincial and Federal laws. In keeping with this expectation, I wish to raise with you two concerns, one with respect to the proposed Annex itself and the other with respect to the future binding agreements contemplated by the Annex.

Your cover letter indicates that, like the Great Lakes Charter, the Annex is intended to be a “non-binding good-faith agreement” among the U.S. States bordering the Great Lakes and the Canadian Provinces of Ontario and Quebec. The Department appreciates this clarification since the text might otherwise have been misunderstood as conveying an intent to conclude a binding agreement (for example, by the way the prescriptive principles in Directive #3 have been drafted). In light of your assurance and the scheduled signing, I have refrained from suggesting how the non-binding character of the Annex might have been further clarified, just as the Great Lakes Charter itself might have been worded differently to clarify its non-binding intent. . . .

With respect to the future “binding agreement(s)” called for by the Annex, as you know, Congress has encouraged “the Great Lakes States, in consultation with the Provinces of Ontario and Quebec, to develop and implement a mechanism that provides a common conservation standard embodying the principles of water conservation and resource improvement for making decisions concerning the withdrawal and use of water from the Great Lakes Basin.” 42 U.S.C. §1962d-20(b)(2). At the same time, Congress indicated that it was not approving in advance any agreement reached by the Great Lakes States with Ontario and Quebec. *See* 105 Cong. Rec. S11406 (Oct. 31, 2000) (expressing views of Senators Baucus, Levin and Smith that 42 U.S.C. §1962d-20(b)(2) should not “be interpreted as granting pre-approval to standards which have not yet been developed and which Congress has not reviewed”). I understand that your intent would be to submit for Congressional approval any new water conservation and resource improvement standards.

You should know, however, that the Government of Canada has expressed its view that it would be contrary to “international law and the Constitution of Canada” for Quebec and Ontario on their own, without the involvement of Canadian federal authorities, to conclude such binding agreements with the Great Lakes States. *See Comments from the Government of Canada on Annex 2001 to the Council of Great Lakes Governors*, February 28, 2001, at 3. Thus, the Great Lakes States and the Canadian Provinces will need to work with the U.S. and Canadian governments on the modalities of establishing the binding arrangements

envisioned by the Annex to ensure that they can properly be characterized as legally binding for both Canada and the United States at the federal, state and provincial levels.

It will also be important to ensure that the standards in such agreements are consistent with the standards and priorities found in treaties such as the Boundary Waters Treaty of 1909 and the Great Lakes Water Quality Agreement and the process by which the standards are reviewed and established is and will be consistent with existing and future processes for boundary waters issues, including the possible involvement of the International Joint Commission. These principles, we understand, are recognized in Annex Directive #3, which contemplates that any future binding agreements would comply with “applicable state, provincial, federal and international law and treaties.”

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## **2. Relationship Between U.S. Constitution Treaty Clause and President’s Ability to Enter into Executive Agreements**

On November 26, 2001, the U.S. Supreme Court denied a petition for a writ of certiorari to the Eleventh Circuit in *Made in the USA Foundation v. United States of America*, 242 F.3d 1300 (11th Cir. 2001), *cert denied*, *United Steelworkers v. United States*, 122 S.Ct. 613 (2001). In the suit, plaintiffs challenged the validity of the North American Free Trade Agreement (NAFTA) among the United States, Mexico and Canada, 32 I.L.M. 289 (1993), on the ground that it had not been submitted for advice and consent to ratification as a treaty by a two-thirds vote of the Senate under Article II, Section 2 of the Constitution (the “Treaty Clause”). Instead it was negotiated under an expedited legislative procedure known as “fast track,” 19 U.S.C. §§ 2191, 2902(b)–(c), 2903(b)–(c). That procedure requires the President to consult with, and seek advice from, Congress and the private sector before and during trade negotiations, in exchange for an expedited “yes-or-no” vote by both Houses of Congress on the final agreement and proposed implementing legislation, without amendment. 19 U.S.C. § 2191. Congress approved and implemented NAFTA through the NAFTA Implementation Act (19



U.S.C. §§ 3301–3473), which was passed by majorities in both Houses of Congress.

Plaintiffs filed this action in July 1998, seeking a declaration that NAFTA is null and void, and that the provisions of the Implementation Act are also void to the extent they carry out NAFTA; and an order directing the President to notify Mexico and Canada that the United States was terminating its participation in NAFTA. The district court granted summary judgment to the United States, finding that the Treaty Clause is not the exclusive mechanism for approving international trade agreements and that NAFTA could therefore legitimately be approved and implemented through legislation passed by the House and Senate. 56 F. Supp. 2d 1226 (N.D.Ala. 1999). On February 27, 2001, the Eleventh Circuit Court of Appeals vacated the district court decision and remanded with instructions to dismiss on the ground that the case presented a political question and was therefore nonjusticiable. 242 F.3d 1300 (11th Cir. 2001). Because of this holding, the court of appeals did not reach the question of whether the Treaty Clause is the exclusive mechanism for approving international trade agreements.

The excerpts below from the brief of the United States as respondent in opposing the grant of certiorari, filed October 2001, set forth its arguments in support of the court of appeals decision that the case presents a non-justiciable political question and that, if the case were justiciable, the Treaty Clause of the Constitution does not provide the exclusive mechanism for negotiation and approval of agreements dealing with foreign commerce. Internal references to submissions by Petitioners have been omitted.

The full text of the brief is available at [www.usdoj.gov/osg](http://www.usdoj.gov/osg).

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## STATEMENT

1. The Treaty Clause of the Constitution, Article II, Section 2, Clause 2, provides that the President “shall have Power, by and

with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.” The Constitution also recognizes other types of understandings and arrangements with foreign nations. In particular, Article I, Section 10 provides categorically that “No State shall enter into any Treaty, Alliance, or Confederation,” but further provides that no State shall enter into “any Agreement or Compact with another State, or with a foreign Power,” without the consent of Congress. The Constitution does not specifically distinguish a treaty from an agreement or compact, nor does it describe the understandings or arrangements that are subject to the advice and consent procedure of the Treaty Clause.

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Because the court of appeals concluded that the case presents a political question, it did not decide whether Senate advice and consent to NAFTA under the Treaty Clause was required. The court stressed, however, that it was not granting the political Branches “unfettered discretion” to decide whether international agreements must be approved pursuant to the Treaty Clause. Rather, the court’s holding was limited to “the context of international commercial agreements such as NAFTA,” where Congress’s enumerated power to regulate foreign commerce was directly implicated and there was no identifiable standard for determining whether a particular agreement must be regarded as a “treaty” that requires the advice and consent of the Senate under the Treaty Clause.

## ARGUMENT

The court of appeals’ holding that this case presents a non-justiciable political question is correct and does not conflict with any decision of this Court. Petitioners have not asserted a conflict between the decision below and a decision of another court of appeals. This case also is not an appropriate vehicle for addressing the reach of the Treaty Clause, Article II, Section 2, Clause 2, because it presents serious standing questions and questions about the appropriateness of judicial relief that provide alternative bases for dismissing the case. Finally, if the merits were considered, the provisions of the Implementation Act that remove barriers to trade

fall squarely within Congress's enumerated powers under Article I of the Constitution. Congress's express approval of NAFTA in the Implementation Act did not vitiate Congress's powers to legislate in the area of foreign commerce and to establish trade rules. Furthermore, even if the proper focus of this suit were approval of NAFTA itself, as petitioners suggest, the express constitutional powers of the President and Congress over foreign policy and foreign trade, as well as the decisions of this Court, demonstrate that the Treaty Clause is not the exclusive means for approving foreign commercial agreements such as NAFTA.

1. a. "The nonjusticiability of a political question is primarily a function of the separation of powers." *Baker v. Carr*, 369 U.S. 186, 210 (1962). Accordingly, a case presents a nonjusticiable question if it involves, among other things, "a textually demonstrable constitutional commitment of the issue to a coordinate political department." *Id.* at 217. In this case, overlapping textual commitments to the political Branches establish the political nature of petitioners' claims.

The President exercises foreign-affairs powers as Commander-in-Chief of the armed forces (Art. II, § 2, Cl. 1), through his power to "receive Ambassadors and other public Ministers" (Art. II, § 3), and in the course of "tak[ing] care that the Laws be faithfully executed" (*ibid.*). He is the Nation's "guiding organ in the conduct of our foreign affairs," in whom the Constitution vests "vast powers in relation to the outside world." *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948); see *Department of the Navy v. Egan*, 484 U.S. 518, 529 (1988) (noting "the generally accepted view that foreign policy was the province and responsibility of the Executive") (citation omitted).

With respect to foreign commerce, however, the Constitution vests Congress with broad regulatory power. In particular, the Foreign Commerce Clause, Article I, Section 8, Clause 3, empowers Congress to "regulate Commerce with foreign Nations." Congress also is authorized to take various other actions that may affect foreign commerce, such as raising revenue (Art. I, § 7, Cl. 1), laying and collecting taxes, duties, imposts, and excises (Art. I, § 8, Cl. 1), and regulating the value of foreign currency (Art. I, § 8, Cl. 5). This Court has recognized that "[t]he Constitution gives Congress broad, comprehensive" and "plenary" powers to regulate foreign commerce. *United States v. 12 200-Ft. Reels of*

Super 8MM Film, 413 U.S. 123, 125–126 (1973); accord *California Bankers Ass’n v. Schultz*, 416 U.S. 21, 46 (1974) (“[t]he plenary authority of Congress over \* \* \* foreign commerce is not open to dispute”). In the language of *Baker v. Carr*, the Foreign Commerce Clause and the other provisions cited above constitute “a textually demonstrable constitutional commitment” of foreign-commerce powers to Congress, 369 U.S. at 217, which is tempered only by the assignment of general foreign-affairs powers to the President.

Petitioners do not dispute that the subjects addressed by the Implementation Act lie within the broad reach of Congress’s plenary powers under Article I of the Constitution, including those over foreign commerce and the laying of taxes, imposts, duties, and excises. They do not argue, for example, that the subject matter of the Implementation Act is inherently beyond the power of Congress to address under the Constitution in the absence of a prior treaty to which the Act of Congress gives effect. Cf. *Missouri v. Holland*, 252 U.S. 416, 432 (1920). Petitioners nevertheless suggest that in order for the Implementation Act to be valid, it must also be supported by the exercise of the President’s power under Article II of the Constitution to make treaties by and with the advice and consent of the Senate. We know of no authority, however, for the proposition that a court may invalidate provisions of an Act of Congress that raise or lower tariffs or enact other trade regulations that are within Congress’s legislative power, simply because the Act of Congress was in turn based on standards that were previously negotiated by the President with other nations and approved by Congress in the Act itself.<sup>1</sup> Whether a law that is independently within the power

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<sup>1</sup> Congress not infrequently enacts laws that embody principles that have been the subject of negotiations by others, see, e.g., *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 170 n.3 (1980), as well as laws providing for the raising or lowering of tariffs and other trade barriers with a view toward the adoption of reciprocal measures by other nations, see, e.g., *Field v. Clark*, 143 U.S. 649, 680, 682–690 (1892); 19 U.S.C. 2701–2707 (1994 & Supp. V 1999) (Caribbean Basin); 19 U.S.C. 3101–3111 (telecommunications trade). The fact that the President has received a commitment from the leader of another nation concerning reciprocal measures in advance of Congress’s enactment of a law does not render it impermissible for Congress to take that action into account and, indeed, to approve the action as part of its enactment.

of Congress to enact should be accompanied by the President's making of a treaty addressing the same subject matter would appear to be a classic example of a question that is for the political Branches to decide.

b. Petitioners in effect argue that Congress's legislative powers are limited by the Treaty Clause and that measures approving international commercial accords are an exception to Congress's plenary legislative power over foreign commerce and the laying of taxes, duties, imposts, and excises. Even then, petitioners do not dispute that the Constitution reserves to the political Branches "the power to make such international agreements as do not constitute treaties in the constitutional sense." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318 (1936) (citation omitted); see *Weinberger v. Rossi*, 456 U.S. 25, 30 n.6 (1982) ("We have recognized \* \* \* that the President may enter into certain binding agreements with foreign nations without complying with the formalities required by the Treaty Clause."); *United States v. Belmont*, 301 U.S. 324, 330–331 (1937). Yet petitioners fail to propose—and the Constitution does not provide—an analytical framework for distinguishing between international trade agreements that must be entered into by the President by and with the advice and consent of the Senate under the Treaty Clause, and international trade agreements that Congress may approve and give effect to through the passage of a law pursuant to its express powers under the Foreign Commerce Clause and other provisions of Article I of the Constitution.

The most that petitioners can say is that "historical materials" indicate that "substantial international commercial agreements like NAFTA" are subject to the Treaty Clause. As the court of appeals held, however, that "nebulous argument" based on extra-textual sources puts this case squarely within *Baker v. Carr*'s rule that a case also presents a political question if there is "a lack of judicially discoverable and manageable standards for resolving it." 369 U.S. at 217. See also *Goldwater v. Carter*, 444 U.S. 996, 1003 (1979) (plurality opinion) (challenge to procedure by which President terminated mutual defense treaty with Taiwan is nonjusticiable because of "the absence of any constitutional provision governing the termination of a treaty, and the fact that different termination procedures may be appropriate for different treaties"); *Nixon v. United States*, 506 U.S. 224, 230 (1993) (find-

ing political question because “the use of the word ‘try’ in the first sentence of the Impeachment Trial Clause lacks sufficient precision to afford any judicially manageable standard of review of the Senate’s actions”).<sup>2</sup>

Petitioners note that this Court has sometimes found cases judicially manageable despite a lack of clarity in the relevant provisions of the Constitution. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988); *INS v. Chadha*, 462 U.S. 919 (1983). But as the court of appeals noted, none of the cases on which petitioners rely bore directly on foreign policy or threatened to undermine the authority of the President and Congress “to manage our external political and economic relations.”

By contrast, and as the court of appeals also explained, for the judiciary to attempt to resolve the question of whether NAFTA was required to be approved under the Treaty Clause of Article II as well as pursuant to Congress’s enumerated powers under Article I would “express[] [a] lack of the respect due coordinate branches of government” and create “the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. at 217. A judicial declaration invalidating NAFTA would “clearly risk” international embarrassment of both the Executive and Legislative Branches and produce “serious repercussions for our nation’s external relations with Mexico and Canada.” Indeed, the court of appeals noted that “granting the [petitioners’] requested relief in this case \* \* \* would potentially undermine every other major international commercial agreement made over the past half-cen-

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<sup>2</sup> In *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540 (1840), a plurality of the Court explained that “[t]he power to make treaties is given by the Constitution in general terms, without any description of the objects intended to be embraced by it.” *Id.* at 569. Although the plurality suggested that the Treaty Clause could be applied to “all those subjects, which in the ordinary intercourse of nations had usually been made subjects of negotiation and treaty; and which are consistent with the nature of our institutions, and the distribution of powers between the general and state governments,” the Court did not “attempt[] to define the exact limits of this treaty-making power, or to enumerate the subjects intended to be included in it.” *Ibid.* Nor did the plurality address the question of whether any particular measure must be adopted by the federal government by entering into a treaty rather than through the exercise of Congress’s plenary legislative powers.

ture.” Particularly given that there is no dispute between the Executive and Legislative Branches regarding the procedures used to approve NAFTA, judicial restraint is appropriate. Cf. *Goldwater v. Carter*, 444 U.S. at 997 (Powell, J., concurring) (“The Judicial Branch should not decide issues affecting the allocation of power between the President and Congress until the political branches reach a constitutional impasse.”).

2. The court of appeals found that petitioners have Article III standing. Nonetheless, this case presents serious standing questions that add to the likelihood that the case would be found non-justiciable if further review were granted and, therefore, further counsel in favor of denying the petition.

To establish standing, petitioners would have to show that it is “‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). The standing inquiry is “especially rigorous” when the constitutionality of legislation is at issue. See *Raines v. Byrd*, 521 U.S. 811, 819–820 (1997).

Petitioners allege that the political Branches’ approval and implementation of NAFTA has injured them in their efforts to buy American-made products, in employment, and in the labor union petitioners’ representation of their members. Even assuming that the petitioners have suffered constitutionally sufficient injury (which was not contested before the district court in the context of the motion to dismiss), judicial invalidation of NAFTA would redress those injuries only if it resulted in a greater availability of American-made products and caused particular businesses to increase their employment in the United States. Indeed, to satisfy the “redressability” requirement, petitioners would have to establish, at a minimum, that (1) if the United States ceased to consider itself bound by NAFTA and ceased to apply the Implementation Act, it would raise trade barriers rather than pursuing policies consistent with NAFTA under other provisions of law, see, e.g., 19 U.S.C. 2461 (1994 & Supp. V 1999) (authorizing President to provide duty-free treatment for articles from developing countries); (2) the new trade barriers would cause firms to produce more in the United States and to extend additional jobs or more favorable terms to workers represented by the petitioner unions, rather than continuing production in their current loca-

tions or shifting production to new locations outside the United States; and (3) such changes would not be offset by ensuing economic or policy changes in Mexico, Canada, or other countries that cause a reduction of production and jobs in the United States. A coalescence of political, economic, social, and other forces therefore would determine whether petitioners' asserted injuries would be ameliorated by the relief they seek. Where, as here, redressability "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict," standing "is ordinarily substantially more difficult to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. at 562 (internal quotation marks omitted).

Petitioners' request for a judicial injunction ordering the President to notify Canada and Mexico that the United States is withdrawing from NAFTA presents an additional redressability issue, because a court has no power to enjoin the President to perform such an undertaking. See *Mississippi v. Johnson*, 71 U.S. (4 Wall.) 475, 501 (1866) ("[W]e are fully satisfied that this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."); *Franklin v. Massachusetts*, 505 U.S. 788, 802–803 (1992) (opinion of O'Connor, J.); *id.* at 826–827 (Scalia, J., concurring in part and concurring in the judgment).

Finally, petitioners face an especially high hurdle in showing standing because NAFTA serves as a framework to facilitate the parallel enactment of tariff reductions and other trade laws that each signatory nation could have adopted unilaterally and that, under our Constitution, lie within the plenary power of Congress to enact on behalf of the United States. Wholly aside from their relationship to NAFTA, the trade rules established by the Implementation Act were a valid exercise by Congress of its authority to regulate foreign commerce through legislation. See Point 1, *supra*. Thus, the Implementation Act's provisions could well remain in force even if, as petitioners request, the courts declared Congress's approval of NAFTA invalid.<sup>3</sup>

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<sup>3</sup> Relying on 19 U.S.C. 3311 (approving NAFTA) and 3331 (tariff modifications to implement NAFTA), the court of appeals concluded that the entirety of the Implementation Act would be void if NAFTA were not



3. Quite apart from the applicability of the political question doctrine, the defects in petitioners' standing, and the unavailability of relief against the President, there are other serious problems concerning the appropriateness of judicial relief in this case. As the court of appeals correctly noted, the Administrative Procedure Act (APA), 5 U.S.C. 701–706, does not furnish a cause of action in this case because only the President can terminate this Nation's participation in NAFTA and the President is not an "agency" for purposes of the APA. Although other Executive Branch officials have responsibilities for carrying out the Implementation Act, petitioners do not name any such officials in their complaint, and they do not base their challenge on any particular "final agency action" by one of those officials that adversely affects their members in a distinct and concrete way. Petitioners instead have brought a broad-based challenge to NAFTA itself. Cf. *Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 890–894 (1990).

It is true that in *Franklin*, *supra*, the Court entertained a constitutional challenge to the compilation of state census totals even though the plaintiffs had no cause of action against the President under the APA. But there the plaintiffs challenged a discrete governmental decision, issued by the Secretary of Commerce under the Census Act and approved by the President under the Apportionment Act, that had an immediate and direct impact on what the plaintiffs alleged to be their distinct rights under the Constitution to a particular apportionment of Representatives. See 505 U.S. at 797–800. Petitioners here do not rest their challenge to NAFTA on an alleged direct and immediate interference with any comparably distinct and personal constitutional rights. In the absence of an express statutory cause of action for the sort of generalized challenge that petitioners raise, the courts at the very least should decline to entertain petitioners' suit for declaratory and injunctive relief as a matter of equitable discretion.

4. Even if this case could properly be entertained, the district court was correct in its ruling on the merits that the political

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valid. Neither of the provisions cited by the court of appeals requires such a result, and the court of appeals' severability analysis is open to serious question. Cf. *Printz v. United States*, 521 U.S. 898, 935 (1997) (declining to address severability question after invalidating provisions of the Brady Act on constitutional grounds).

Branches exercised valid constitutional authority in providing a framework for negotiating NAFTA and then approving and giving effect to NAFTA in United States law through the passage of a law, rather than under the Treaty Clause.

First, and as discussed above, the revisions to United States trade laws made by the Implementation Act are independently within Congress's plenary power. The Implementation Act is not the sort of law that is valid only because it was enacted to implement a treaty that was made by the President by and with the advice and consent of the Senate. Cf. *Missouri v. Holland*, 252 U.S. at 432. There accordingly is no basis for a court to invalidate that law simply because it enacts standards that were embodied in a trade agreement that the President negotiated for presentation to Congress.

With respect to approval of the NAFTA agreement itself, moreover, Congress followed permissible procedures. While the Treaty Clause establishes a procedure by which the President may enter into treaties on behalf of the United States, Article I, Section 10 of the Constitution recognizes that sovereigns additionally may enter into "agreements" and "compacts" with foreign nations. The Constitution does not specify any particular procedures for forming international understandings or arrangements by means other than a treaty. Nor, as noted in Point 1, above, does it specify circumstances under which an international agreement may be approved only pursuant to the Treaty Clause.

Although the President and the Senate could have approved NAFTA through the Treaty Clause, the existence of that option does not suggest that it was exclusive. In *Dames & Moore v. Regan*, 453 U.S. 654 (1981), for example, the Court upheld the suspension of judicial claims against Iran by an Executive Order that was issued by the President as part of a settlement with Iran, even though similar settlement agreements had been adopted under the Treaty Clause. "Though [similar] settlements have sometimes been made by treaty," the Court explained, "there has also been a longstanding practice of settling such claims by executive agreement without the advice and consent of the Senate," *id.* at 679 (footnote omitted), which Congress has implicitly approved, *id.* at 680–686. In *Weinberger v. Rossi*, moreover, the Court noted that "Congress has not been consistent in distinguishing between

Art. II treaties and other forms of international agreements,” 456 U.S. at 30, but the Court did not intimate that the latter agreements are constitutionally defective.

From its earliest days, Congress has used bicameral legislation to approve rules governing trade with foreign nations. See, e.g., Act of June 13, 1798, ch. 53, 1 Stat. 565 (suspending trade between United States and France); Act of Dec. 19, 1806, ch. 1, 2 Stat. 411 (suspending prohibition on importation of certain goods and authorizing President to extend suspension); Act of Mar. 1, 1809, ch. 24, 2 Stat. 528 (imposing embargo on commercial dealings between United States, Great Britain, and France). For more than a century, moreover, Congress has provided advance legislative approval of presidential trade initiatives. *United States v. Curtiss-Wright Export Corp.*, 299 U.S. at 322–326 & n.2. In *Field v. Clark*, 143 U.S. 649 (1892), this Court upheld the constitutionality of one such provision (the McKinley Tariff Act, ch. 1244, 26 Stat. 567), which provided advance approval for the President to revise tariffs in response to the actions of other countries, and empowered him to enter into tariff agreements with foreign nations. In sustaining the Act, the Court specifically rejected the contention that the Act impermissibly delegated not only law-making power, but also treaty-making power to the President. See 143 U.S. at 694. Such “long settled and established practice is a consideration of great weight in a proper interpretation of constitutional provisions” relating to the operation of government. *The Pocket Veto Case*, 279 U.S. 655, 689 (1929).

Petitioners suggest that approving and implementing NAFTA through bicameral passage and presentment to the President avoided a constitutional “check.” But as this Court stated in holding that Congress may override a treaty by a duly enacted law, an Act of Congress is not “less entitled to respect \* \* \* than a treaty” on the basis that it was approved by majorities of the House and Senate rather than “two thirds of the Senators present,” Article II, Section 2, Clause 2. *Edye v. Robertson* (Head Money Cases), 112 U.S. 580, 599 (1884). “If there be any difference in this regard, it would seem to be in favor of an act in which all three of the bodies [i.e., the President, the Senate, and the House] participate.” *Ibid.*

**B. CONCLUSION, ENTRY INTO FORCE, RESERVATIONS,  
APPLICATION AND TERMINATION****1. Obligations of Signatories Prior to Ratification**

In recent years, questions have been raised by some members of the U.S. Senate concerning the legal ramifications of signing a treaty. In particular, some have questioned the position of the Executive Branch that, under Article 18 of the Vienna Convention on the Law of Treaties, which the United States regards as the authoritative guide to current treaty law and practice, a country that has signed but not ratified a treaty may not take action that would defeat the object and purpose of the treaty.

On February 12, 2001, Secretary of State Colin Powell responded to a question for the record from Senator Helms of the Senate Foreign Relations Committee concerning U.S. views and practice in this area. The question and answer are set forth below in full.

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**Question:**

In reply to [an earlier] question from Senator Helms entitled Treaty Affairs: Treaty Signature, you wrote in part: “I understand the United States has consistently supported [the proposition that, once the U.S. signs a treaty, it assumes a responsibility not to defeat the intended purpose of the treaty pending ratification] since the Johnson Administration.” Please explain the origin and content of the referenced Johnson Administration position and related developments to date.

**Answer:**

According to the Department of State’s Legal Adviser’s office, the Johnson Administration’s position was taken in 1964 when it submitted U.S. Government comments on the International Law Commission’s draft articles on the Law of Treaties. One provi-

sion, adopted as Article 18, concerns a signatory's obligation to "refrain from acts which would defeat the object and purpose of a treaty until it has made its intention clear not to become a party to the treaty." In commenting on that provision, the Johnson Administration stated that the United States regarded the article as "highly desirable," adding that the article in the form it was ultimately adopted reflected "generally accepted norms of international law."

That position has been reaffirmed, according to the Department's legal office, by succeeding administrations. For example, during the Nixon Administration, Secretary of State William P. Rogers commented that the "object and purpose" principle is "widely recognized in customary law." During the Carter Administration, the Department's Legal Adviser found that the principle established certain immediate legal obligations for the Soviet Union related to SALT II; his Memorandum of Law on this point was furnished to the Senate on August 2, 1979. His successor advised Secretary of State Vance that the principle would continue to apply notwithstanding President Carter's decision to request a delay in the Senate's consideration of the SALT II treaty. With respect to that treaty, the Reagan Administration confirmed that the principle applied to the United States and the USSR between signature in 1919 and the date in 1981 when the United States made clear that it would not ratify. Similar positions were taken by the Clinton Administration.

## **2. Entry into Force Date**

Final clauses of treaties usually fix the date of entry into force by reference to an action—such as the exchange of diplomatic notes signaling that domestic procedures have been completed in a bilateral treaty, or when a specified number of countries have deposited instruments of ratification with a designated depositary in a multilateral treaty. The Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of a Free Trade Area, discussed more fully in Chapter 11.E., provided an alternative, as follows:

## ARTICLE 19: ENTRY INTO FORCE AND TERMINATION

1. The entry into force of this Agreement is subject to the completion of necessary domestic legal procedures by each Party.

2. This Agreement shall enter into force two months after the date on which the Parties exchange written notification that such procedures have been completed, or after such other period as the Parties may agree.

\* \* \* \*

The parties relied on the second alternative. In an exchange of letters dated November 27, 2001, the parties agreed that the Agreement would enter into force on December 17, 2001, 20 days after the date of notification rather than wait two months.

### 3. Reservation Practice

In July 2001, the International Whaling Commission ("IWC") narrowly voted not to accept a reservation by Iceland contained in its instrument of adherence to the International Convention on the Regulation of Whaling, Dec. 2, 1946, 1953 U.N.T.S. 74. Iceland's instrument was expressly conditioned on a reservation to the moratorium on commercial whaling found in paragraph 10(e) of the Convention Schedule, which has been in place since 1982. Excerpts below setting forth the United States view are drawn from a legal analysis prepared by the United States in response to a diplomatic note from the Icelandic Ministry of Foreign Affairs of August 2, 2001 to IWC members, protesting the IWC action and reiterating the position of Iceland.

The full text is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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On June 8, 2001, the Government of the United States of America, as depositary for the International Convention for the Regulation of Whaling (the Convention), received Iceland's instrument of adherence to the Convention. That instrument was expressly con-

ditioned on a reservation to the commercial whaling moratorium found in Paragraph 10(e) of the Convention's Schedule. The United States received the instrument without prejudice to its own views of the reservation as a Party to the Convention.

As noted in the Ministry of Foreign Affairs' diplomatic note dated August 2, 2001, the International Whaling Commission (IWC) at its 53rd Annual Meeting decided that it had the legal competence to decide whether to accept Iceland's reservation and it voted not to do so.

During those discussions, both Iceland and Commission members had an opportunity to air their views on the matter. For the reasons outlined below, the United States is of the view that the Commission acted legally in all respects regarding this matter during the 53rd Annual Meeting. Given the Commission's decisions, the United States recognizes Iceland as an observer to the IWC Commission, but not as a Party to the Convention.

\* \* \* \*

Even though it is not a party to the [Vienna Convention on the Law of Treaties ("VCLT")], the United States considers it to be the authoritative guide to current treaty law and practice. By its terms, the VCLT does not apply directly to treaties concluded prior to its entry into force. Accordingly, the VCLT's January 27, 1980 entry into force date precludes it from applying directly to the 1946 IWC Convention. However, VCLT Article 4, in providing for its non-retroactivity, also provides that this condition is "(w)ithout prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention." Accordingly, to the extent the provisions of the VCLT reflect customary international law, they may be invoked to address Iceland's reservation to the Convention.

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VCLT Article 5 provides in part that the VCLT's norms apply to any treaty which is the constituent instrument of an international organization "without prejudice" to any relevant rules of the organization. In this instance, there are relevant rules that are applicable to Iceland's reservation, so it is unnecessary to address

the application of Article 20 [on which Iceland appears to rely]. These relevant rules are the provisions of the Convention that deal with amending the Schedule.

As noted in the U.S. Opening Statement to the IWC, the United States' views are based on the fact that Iceland's reservation constitutes, in effect, a proposed amendment to the Schedule. The reservation by its terms would amend paragraph 10(e) of the Schedule to modify its legal effect. Currently, zero catch limits for commercial whaling apply to all parties to the Convention under paragraph 10(e) except for those states that filed objections in accordance with Article V(3) of the Convention. Article V(3) of the Convention allows states to object to amendments adopted by the IWC within a 90-day time frame. If a government does object, the amendment does not become effective for any states for an additional 90 days, thereby allowing governments which did not originally object to review the situation created by the non-participation of one or more other governments. In the case of the moratorium, its adoption was originally notified on 6 August 1982. Four states (Peru (on 26 October 1982), Norway (on 2 November 1982), U.S.S.R. (on 3 November 1982), and Japan (on 4 November 1982) objected within the requisite 90 days, and therefore the amendment did not become effective until 3 February 1983, 180 days after states were notified of its adoption. Iceland, which was a party to the Convention at the time, did not take advantage of its right to object to the amendment during either the original or additional 90-day periods.

Iceland's reservation, therefore, would amend the Schedule by modifying the current scope of application of Paragraph 10(e) with respect to all parties. Instead of all IWC Contracting Parties being bound to the commercial moratorium except for those states that objected in accordance with Article V(3) of the Convention, the commercial moratorium would apply to all states except those that objected and Iceland. Moreover, Iceland's reservation would amend paragraph 10(e) by permanently exempting Iceland from such zero catch limits without affording other governments the opportunity to review their own positions with respect to such an exemption in accordance with Article V(3).

Furthermore, the practice of parties to the Convention supports extending the Convention's rule on amendments to the



Schedule to apply to reservations to the Schedule as well. The only previous proposed reservation to the Schedule was treated as an amendment to the Schedule. In 1948, Denmark requested the views of governments concerning its proposal to ratify the IWC Convention with a reservation to a portion of the Schedule. Specifically, Denmark sought to exclude the application to factory ships of Schedule provisions on regulations governing the operation of land stations if those factory ships were operating under the jurisdiction of the Danish government, and moving entirely within Danish territorial waters, including the territorial waters of the Faroe Islands and Greenland.

Four founding Parties of the Convention—Norway, the U.S.S.R., the United Kingdom and the United States—objected to the proposed reservation, each indicating that the matter should be referred to the IWC when it was established, the IWC Convention not yet having entered into force (the other 10 states indicated that they were prepared to accept the Danish reservation).

In a May 12, 1949 note to Denmark, the United States, acting as depositary, informed Denmark that “certain of the signatory and adhering governments to the International Convention for the Regulation of Whaling have stated that they cannot agree to the ratification of the Convention with the reservation proposed by Denmark as this reservation would constitute an amendment to the schedule annexed to the Convention and is therefore a matter which should be submitted to the International Whaling Commission for consideration when it is established.”

As a result of these objections, Denmark did not make its proposed reservation when it deposited its instrument of ratification to the IWC Convention on May 23, 1950. The United States takes the view that the Danish case provides precedent within the IWC for considering these types of reservations as amendments to the Schedule.

Since Iceland’s reservation would constitute an amendment to the Schedule, it required IWC acceptance. Articles III and V of the Convention invest the IWC with the authority to amend the provisions of the Schedule by a three-fourths majority of those members voting. Absent three-fourths of the IWC members accepting Iceland’s reservation, Iceland’s reservation does not accord with the Convention’s rules. In such circumstances, the United

States views the IWC decision to continue to treat Iceland as an observer to be legally valid.

Iceland's reservation (and the reservation proposed by Denmark) are materially different from the statements made by Argentina, Chile, Peru, and Ecuador when those states became parties to the Convention. None of the statements related to the Convention's Schedule. Moreover, although styled as reservations, these statements did not modify the legal effect of the Convention's provisions with respect to other IWC parties. Argentina's statement, to which the United Kingdom objected, related to reaffirming its claim over the Falkland/Malvinas islands and other territories in the Antarctic region, without modifying the rights and obligations it assumed under the Convention. Similarly, the statements of Chile, Peru and Ecuador related to their views regarding certain provisions of the Law of the Sea Convention. They did not have any direct bearing on the rights and obligations among the parties since the Convention applies to all waters of parties to the Convention. In contrast, as noted above, the Icelandic reservation would modify directly and substantially the legal rights and obligations of the IWC Parties.

Finally, the Ministry of Foreign Affairs' note takes the position that the validity of a reservation with respect to a provision of an international agreement must be judged on the basis of whether it is compatible with the object and purpose of the agreement in question (a principle codified in VCLT Art. 19(c)). Since in Iceland's view, the reservation is consistent with the object and purpose of the Convention, the reservation cannot be rejected. Aside from ignoring the applicable rules of the Convention for accepting amendments to the Schedule, such an approach fails to fully reflect the distinction in the VCLT between the admissibility and acceptability of reservations. All reservations must be "admissible"—i.e., compatible with a treaty's object and purpose. However, simply because a reservation is compatible with a treaty's object and purpose does not render it legally valid. It must also be "accepted" by other states parties to the treaty, which, as detailed above, in the case of the Convention is done through a vote before the IWC.

#### 4. Treaty Interpretation: Scope of Applicability

On February 20, 1998, a Canadian government vessel, the *HCMS Yellowknife*, was damaged when it struck the locks at Pedro Miguel in the Panama Canal. The Government of Canada asserted a claim against the Panama Canal Commission, a U.S. Government entity, in connection with the incident. *The Queen v. Panama Canal Commission*, Civil Action No. 99-3025 (E.D. La). The United States asserted that the claim was waived under the terms of the Agreement between the United States of America and Canada respecting waiver of certain claims involving government vessels, which entered into force on November 15, 1946 ("Agreement"). Canada disagreed, arguing that the Agreement applied only to a claim resulting from a "collision," and that that term applied only to collisions between government vessels, not between a government vessel and a stationary object. On July 23, 2001, the Court of Appeals for the Fifth Circuit affirmed the lower court's dismissal of the case, March 30, 2000. Neither opinion was published. Excerpts below from an affidavit provided by Robert E. Dalton, Assistant Legal Adviser for Treaty Affairs, U.S. Department of State, describe the function of his office and the view of the United States as to the proper interpretation of the Agreement.

The full text of the affidavit is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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1. I am now, and have been since August 1990, the Assistant Legal Adviser for Treaty Affairs of the United States Department of State, Washington, D.C. The Treaty Affairs Office oversees the conclusion, Congressional reporting, publication, and maintenance of records concerning United States treaties and other international agreements. In this regard, it keeps and preserves records of treaties and other international agreements concluded by the United States of America, in accordance with regulations found in 11 Foreign Affairs Manual Part 750 and 22 C.F.R. Part 181.

2. My responsibilities as head of the Department's Treaty Affairs Office require that I be familiar with the practice of the United States in matters concerning the making, interpretation,

and application of treaties and other international agreements. My responsibilities also include maintaining the official treaty records of the United States and publishing the annual volume entitled *Treaties in Force*, which is an official publication of the Department of State that lists treaties and other international agreements in force between the United States and other countries as of the date of publication.

3. I have been asked, in connection with the claim asserted by the Government of Canada (GOC) against the Panama Canal Commission (PCC) for the incident surrounding the *HCMS Yellowknife*, about the applicability of the “Agreement between the United States of America and Canada respecting waiver of certain claims involving government vessels” (“the Agreement”), effected by an exchange of notes at Washington September 28, November 13 and 15, 1946, and which entered into force on November 15, 1946. . . .

\*   \*   \*   \*

6. I have been asked to express an opinion on the applicability of the Agreement to the claim asserted by the GOC against the PCC in connection with an incident on February 20, 1998, in which a Canadian government vessel—the *HCMS Yellowknife*—suffered damages when it struck the locks at Pedro Miguel in the Panama Canal.

7. The Agreement is styled as an agreement respecting “waiver of certain claims involving government vessels.” Article 1 of the Agreement, in relevant part, defines the term “Government vessel” to mean “a vessel (including a vessel of war), flying-boat or drydock owned by . . . either Government. . . .” (The definition also articulates certain exceptions to the term “Government vessel” that are not applicable here). The Parties are in agreement that the *HCMS Yellowknife* is a vessel “owned by” the Government of Canada. Accordingly, it qualifies as a Government vessel under the Agreement.

8. Article 2 of the Agreement provides that “[t]he Government of Canada and the Government of the United States of America agree that each shall waive all those legal maritime claims by either Government against the other Government or any servant, agent, or instrumentality of the other Government or any Government vessel in respect of collision, . . . negligent naviga-

tion or negligent management of the said Government vessel. . . .” (Article 2 goes on to state that its provisions are subject to those of Articles 3 and 4, but those Articles are not relevant to the instant matter).

9. For the reasons articulated below, I believe the Agreement was intended to cover not only collisions between government vessels but also collisions between a government vessel and a stationary object. Nothing in the Agreement supports the view that it applies only to collisions between vessels. In this regard, the differences between the Agreement and a predecessor agreement, signed in 1943, are instructive. The 1943 agreement, entitled “Waiver of Claims Arising as a Result of Collisions between Vessels of War,” was effected by an exchange of notes at Washington May 25 and 26, 1943. . . . The scope of that earlier agreement was in fact limited to collisions between vessels, and more specifically, to “collisions between United States warships and ships of the Royal Canadian Navy.” . . . This understanding was subsequently formally confirmed by the Government of Canada in Diplomatic Note No. 589 from Canadian Minister M.M. Mahoney to Secretary of State Cordell Hull, dated November 11, 1943, in reply to Secretary Hull’s Diplomatic Note, dated September 3, 1943 . . . Article I of the 1943 agreement stated in its entirety as follows:

The Government of the United States of America and the Government of Canada agree that **when a vessel of war of either Government shall collide with a vessel of war of the other Government**, resulting in damage to either or both of such vessels, each Government shall bear all the expenses which arise directly or indirectly from the damage to its own vessel, and neither Government shall make any claim against the other Government on account of such damage or expenses. (emphasis added).

10. Article 6 of the 1946 Agreement, however, expressly terminated and superseded the 1943 agreement. Unlike the 1943 Agreement, the 1946 Agreement was drafted without specific limitation to vessel-to-vessel incidents, and nowhere does its text make a reference to the phrase “between vessels” or words to that effect. (I note that the reference to “collisions between ves-

sels of war” in the introductory paragraph of the Agreement clearly is intended to describe the scope of the 1943 agreement, but does not purport to characterize the scope of the superseding 1946 Agreement). Rather, a plain reading of the language in Article 2 of the 1946 Agreement supports the view that it covers claims by one Government against the other Government with respect to any collision involving a Government vessel of either Government.

11. We have found no evidence that the negotiators of the Agreement intended the term “collision” to bear anything other than the ordinary, contemporaneous meaning of the term. (*See e.g.*, definition of “collision” in James A. Ballentine, *Law Dictionary* (Rochester, 1948): “[t]he act of colliding; a striking together, or against.”). . . . Although in maritime parlance the term “allision” is used in some contexts—the asserted difference being that an “allision” is the striking of a vessel against an object other than a vessel, whereas a “collision” is the striking of a vessel against another vessel—there is no indication that the term “collision” was used in the 1946 agreement in any way other than its ordinary meaning. There is also no evidence that the Parties, in using the term “collision,” intended to exclude cases of “allision.”

12. Based on the language of the Agreement in contrast to that of the 1943 predecessor agreement, as well as some of the contemporaneous written exchanges between the Governments of the United States and Canada (see discussion below), I believe the principal purpose of the revised agreement was precisely to extend the scope of application and number of incidents with respect to which claims could be deemed waived, including incidents involving collisions between vessels and stationary objects. I note that this conclusion does not rest on the notion that the term “government vessels” in Article 1 includes locks (which, concededly, it does not).

13. In research conducted at the U.S. National Archives and Records Administration, my office reviewed contemporaneous official written exchanges between the Government of the United States and the Government of Canada regarding the 1946 Agreement. In one such exchange, the Government of Canada itself articulated the view that the Agreement encompassed “collisions between vessels and stationery [sic] objects.” I am refer-

ring specifically to the Government of Canada's Diplomatic Note No. 319 (dated August 21, 1947). . . . In that Diplomatic Note, the Government of Canada agreed to an earlier suggestion from the Government of the United States for the use of "waiver certificates" to implement the 1946 Agreement, and in that regard stated the following:

This waiver certificate has been taken under consideration by the Canadian Government which now proposes a slightly modified certificate, copies of which are attached.

It is suggested that it would be impracticable to have one form of waiver certificate to cover all cases. A general form is recommended for the following four categories of claims:

- (1) Collisions between two vessels
- (2) **Collisions between a vessel and a stationery (sic) object**
- (3) Salvage
- (4) Cargo claims.

(Emphasis added). . . .

It is clear from the foregoing Diplomatic Note (which is the most formal form of written communication between two Governments) that at the time the Agreement was negotiated, the Government of Canada did not consider the Agreement's scope to be limited only to collisions between vessels.

14. Furthermore, the view that the Agreement encompasses collisions between vessels and stationary objects is supported by subsequent practice of the Parties. For example, an internal State Department document dated May 8, 1952 . . . discusses the applicability of the 1946 Agreement to an incident in which the Canadian National Railways ("CNR") sought damages from the United States in connection with an incident in which one of CNR's piers was struck by a U.S. Government vessel. The document contains no suggestion that the 1946 Agreement might be inapplicable because the incident involved a pier; rather, the issue in controversy appeared to be exclusively whether or not the CNR was an agency or instrumentality of the Canadian Government. Concluding that the CNR was indeed such an agency or instrumentality, the U.S. State Department Office of Treaty Affairs reasoned that the Agreement would apply but that the United States

could nevertheless settle the small claim “if it [could] be done without prejudice to the assertion of all rights of the United States under the agreement in any disputes that may arise in the future.”

15. Aside from the argument based on the term “collision” in Article 2 of the Agreement, that Article includes a separate, additional basis for the conclusion that the GOC claims are waived pursuant to the terms of the Agreement. Article 2 states that the Parties waive any claims against the other Government with respect to “**negligent navigation or negligent management**” of a Government vessel [emphasis added]. It is undisputed that PCC operatives were in control of the *HCMS Yellowknife* at the time of the incident, and that such operatives caused the damage that are the basis of the GOC’s current claim. The PCC officials were “servants, agents, or instrumentalities” of the U.S. Government. The incident that caused damages to the *HCMS Yellowknife* is also admittedly attributable to the “negligent navigation” or “negligent management,” or both, of the vessel by PCC operatives. Accordingly, under the language of Article 2, the claim arising from the *HCMS Yellowknife* incident must be deemed waived as a claim involving the negligent navigation and/or negligent management of a “Government vessel” as defined in Article 1.

16. In sum, I conclude that the 1946 waiver of claims agreement between the United States and Canada is applicable to the claim asserted by the Government of Canada against the Panama Canal Commission in connection with the February 1998 incident in the Panama Canal involving the Canadian vessel *HCMS Yellowknife*. As previously noted, this conclusion does not rest on the notion that the term “government vessels” in Article 1 includes locks. Rather, it derives from (a) the view that the language of the Agreement does not require a collision “between vessels,” but rather any collision involving a government vessel (in this case, the *HCMS Yellowknife*) for which the other government is responsible (a position which has been articulated by the Canadian Government itself in contemporaneous official correspondence with the Government of the United States); and (b) the interpretation that the language in Article 2 of the Agreement regarding “negligent navigation” or “negligent management” of a vessel applies to the circumstances of this case.



**Cross References**

*Applicability of treaty in U.S. in Cybercrime Convention, Chapter*

**3.B.5.b. and Jordan Free Trade Agreement, Chapter 11.E.3.**

*Status as parties to Warsaw Convention, Chapter 11.A.1*

*Interpretation of NAFTA by Free Trade Commission, Chapter 11.C.1.*

*Termination of ABM Treaty, Chapter 18.B.1.*

*Role of international agreements in U.S. domestic litigation,*

**Chapter 2.A.1., A.2., and B.1.a.; Chapter 3.A.3. and B.3.d.;**

**Chapter 6.G.1.a. and b.; Chapter 10.A.2. and A.4.c.; Chapter**

**13.A.7.b.**



## CHAPTER 5

### Federal Foreign Affairs Authority

#### A. FOREIGN RELATIONS LAW OF THE UNITED STATES

##### 1. *Foreign Relations of the United States Series*

The *Foreign Relations of the United States* series presents the official documentary historical record of major U.S. foreign policy decisions and significant diplomatic activity. The series, which is produced by the State Department's Office of the Historian, began in 1861 and now comprises more than 350 individual volumes. The volumes published over the last two decades increasingly contain declassified records from all the foreign affairs agencies. Volumes in the series since 1952 are organized chronologically according to Presidential administrations, and geographically and topically within each subseries: 25 volumes cover the Kennedy administration (1961–1963), 34 cover the Johnson administration (1964–1968), and about 40 are scheduled for the Nixon and Ford administrations (1969–1972, 1974–1976). Volumes on the Nixon administration are now being researched, annotated, and prepared for publication. In 2001 select volumes from the Nixon, Johnson and Kennedy administrations are being made available online at [www.state.gov/r/pa/ho/frus/](http://www.state.gov/r/pa/ho/frus/).

##### 2. Alienage Diversity Jurisdiction

In *Chase Manhattan Bank v. Traffic Stream (BVI) Infrastructure Ltd.*, 251 F.3d 334 (2nd Cir. 2001) plaintiff brought suit under

the alienage diversity statute, 28 U.S.C. § 1332(a)(2). The statute provides for jurisdiction in federal district courts of certain civil actions “between . . . citizens of a State and citizens or subjects of a foreign state.” The statute is based on Article III, § 2 of the U.S. Constitution, which establishes the judicial power of the United States to include controversies “between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.” The respondent in the case was a foreign corporation organized under the laws of the British Virgin Islands.

Chase Manhattan Bank sued respondent in the United States District Court for the Southern District of New York for breach of an indenture agreement providing for the issuance of secured debt to finance respondent’s business ventures. The district court granted summary judgment in favor of petitioner, allowed foreclosure on collateral valued at more than \$49 million, and entered a deficiency judgment of more than \$98 million. 86 F. Supp. 2d 244 (S.D.N.Y. 2000). On appeal, the Court of Appeals for the Second Circuit *sua sponte* raised the question of subject matter jurisdiction and dismissed the case on the basis of *Matimak Trading Co. v. Khalily*, 118 F.3d 76 (2d Cir. 1997), *cert. denied*, 522 U.S. 1091 (1998). The court found that corporations organized under the laws of United Kingdom Overseas Territories including the British Virgin Islands do not qualify as citizens or subjects of a foreign state under the alienage diversity statute. 251 F.3d at 337. The United States filed a brief as *amicus curiae* in support of plaintiff’s subsequent petition to the Supreme Court for a writ of certiorari, excerpted below. Certiorari was granted on January 4, 2002. 122 S.Ct. 803 (2002). Internal references to Petitioner’s submissions have been deleted.

The full text of the brief is available at [www.usdoj.gov/osg](http://www.usdoj.gov/osg).

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## STATEMENT

\* \* \* \*

In *Matimak*, a corporation incorporated in Hong Kong, which was then a Dependent Territory, invoked a federal district court’s alienage jurisdiction prior to Hong Kong’s 1997 reversion to

China. The court of appeals ruled that, because “the United States does not regard Hong Kong as an independent, sovereign political entity,” the corporation did not qualify as a “citizen[] or subject[] of a foreign state.” *Matimak*, 118 F.3d at 82. Furthermore, the court ruled that, because the corporation was not a citizen or subject of the United Kingdom under British law, the corporation was “stateless” and “c[ould not] sue a United States citizen under alienage jurisdiction.” *Matimak*, 118 F.3d at 85, 86. The court of appeals adhered to the reasoning of *Matimak* in *Koehler v. Bank of Bermuda (New York) Ltd.*, 209 F.3d 130, amended, 229 F.3d 424, rehearing en banc denied, 229 F.3d 187 (2d Cir. 2000) (Bermuda corporation and citizen) and *Universal Reinsurance Co. v. St. Paul Fire and Marine Ins. Co.*, 224 F.3d 139 (2d Cir. 2000) (Bermuda corporation).

In this case, the court noted, respondent is a corporation created under the laws of the British Virgin Islands, and “[t]he British Virgin Islands is a British Dependent Territory, as Hong Kong was at the time of *Matimak* and Bermuda was at the time of *Koehler* and *Universal Reinsurance*.” Finding that “[n]othing relevant to the alienage jurisdiction inquiry has changed since we decided those appeals,” the court of appeals concluded that “[w]e are bound to hold that [respondent] is not a citizen or subject of a foreign state and that the district court therefore had no alienage jurisdiction over this action under § 1332(a)(2).” Finding no other basis for jurisdiction, the court of appeals reversed the judgment and remanded the case to the district court with instructions to dismiss the complaint. The court of appeals later denied a petition for rehearing en banc.

## ARGUMENT

The decision of the court of appeals in this case plainly warrants this Court’s review. The question of how the alienage diversity statute applies to companies incorporated in a foreign nation’s territories presents an issue of substantial and recurring commercial importance as well as a matter of foreign relations significance. That question has produced a square conflict among the courts of appeals. Furthermore, the court of appeals that decided this case—which alone holds the view that those com-

panies are “stateless” and which is a forum for a substantial amount of important commercial litigation—has made clear that it intends to adhere to its broadly criticized ruling. Additionally, the court of appeals’ decision is wrong. That decision rejects the traditional and plain meaning of the term “citizens or subjects of a foreign state” and thwarts Congress’s purpose by imposing an arbitrary and unwarranted limitation on the scope of its jurisdictional grant. The decision is not only contrary to the views of other courts of appeals, but also to the views of the United States, the United Kingdom, and numerous academic commentators regarding the relationship of the United Kingdom to its Overseas Territories and the application of the alienage diversity statute to companies incorporated in those territories.

1. The Constitution provides that the the “judicial Power” of the United States shall extend to controversies “between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. Const. Art. III, § 2, Cl. 1. The Framers included that provision to enable Congress to provide a neutral federal forum for lawsuits involving foreign citizens and subjects, in addition to the judicial fora provided by the individual States. See *The Federalist* No. 80, at 406–407 (Alexander Hamilton) (Beloff ed. 1987).<sup>2</sup>

Congress effectuated Article III’s establishment of alienage diversity jurisdiction through the Judiciary Act of 1789, under which the federal courts were first organized. The Judiciary Act stated that the federal courts “shall have original cognizance, \* \* \* of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and \* \* \* an alien is a party.” Ch. 20, 1 Stat. 78. In 1875, Congress amended that provision to conform the language of the statute to the language of the Constitution. See Act of March 3, 1875, Ch. 137, 18 Stat. (Part 3) 470 (federal jurisdiction over suits “between citizens of a State and foreign states, citizens or subjects”). Congress amended that language to its present form in the 1948 recodification of the Judicial Code,

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<sup>2</sup> See generally 15 J. Moore, *Moore’s Federal Practice* § 102.73 (1999); Kevin R. Johnson, *Why Alienage Jurisdiction? Historical Foundations And Modern Justifications For Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 Yale J. Int’l L. 1, 10–16, 30–52 (1996); see also Henry J. Friendly, *The Historic Basis of Diversity Jurisdiction*, 41 Harv. L. Rev. 483 (1927–1928).

Ch. 646, 62 Stat. 930 (§ 1332(a)(2)), as amended by the Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, § 1330, 90 Stat. 2891.

Since its introduction in 1789, the alienage diversity statute has assumed international importance. The United States is now the focus of a tremendous volume of international commerce, and the alienage diversity statute is regularly invoked, as it was in this case, to provide for resolution of commercial disputes involving many millions of dollars. Indeed, sophisticated commercial parties regularly include forum selection clauses in their international contracts in reliance on the alienage diversity statute's provision of a neutral federal forum for resolution of their disputes. See generally *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991) (discussing the enforceability of forum selection clauses); *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (same).

The particular issue here—whether corporations incorporated in the United Kingdom's Overseas Territories are “citizens or subjects of a foreign state”—is, by itself a question of substantial commercial importance. The United Kingdom has represented to the United States and its courts that there are many thousands of banking, insurance, and business companies within its Overseas Territories, and those companies regularly transact business with citizens of the United States. As this case illustrates, those transactions can involve many millions of dollars. Petitioner notes that questions respecting the jurisdictional status of those entities have arisen no less than nine times within the Second Circuit alone since that court's *Matimak* decision. There is accordingly a strong commercial need for a definitive determination whether corporations created within such territories are subject to the alienage diversity statute.

The issue is also important in light of its foreign relations ramifications. The United Kingdom has repeatedly expressed its concerns to the United States, through diplomatic channels and through briefs amicus curiae, that citizens and corporations of its Overseas Territories are citizens or subjects of the United Kingdom for purposes of the alienage diversity statute. The United States has joined the United Kingdom in objecting to the court of appeals' reasoning through its own amicus filings in the courts of appeals. Thus, the two nations with the most direct interest in

the outcome of this case—the United States and the United Kingdom—agree that the court of appeals’ decision presents an issue of great practical importance warranting this Court’s review.<sup>3</sup>

2. The court of appeals’ decision also warrants review because the court’s interpretation of the alienage diversity statute has generated a square conflict among the courts of appeals. As noted previously, the Second Circuit has ruled on four occasions that residents of and companies incorporated in the United Kingdom Overseas Territories are not “citizens or subjects” of the United Kingdom. See [this case] (British Virgin Islands); *Universal Reinsurance Co.* 224 F.3d at 140–141 (Bermuda corporation); *Koehler*, 209 F.3d at 139 (Bermuda corporation and citizen); *Matimak*, 118 F.3d at 85–88 (pre-reversion Hong Kong corporation). The Third, Fourth, and Seventh Circuits have ruled that residents and companies incorporated in those territories are citizens or subjects of the United Kingdom for purposes of the alienage diversity statute. See *Southern Cross Overseas Agencies v. Wah Kwong Shipping Group Ltd.*, 181 F.3d 410, 412–413 (3d Cir. 1999) (pre-reversion Hong Kong corporation); *Koehler v. Dodwell*, 152 F.3d 304, 308 (4th Cir. 1998) (Bermuda resident); *Wilson v. Humphreys (Cayman) Ltd.*, 916 F.2d 1239, 1242–1243 (7th Cir. 1990), cert. denied, 499 U.S. 947 (1991) (Cayman Island corporation).

The division among the courts of appeals is express and irreconcilable. The Third Circuit specifically considered and explicitly “disagree[d]” with the Second Circuit’s analysis in *Matimak*. See *Southern Cross*, 181 F.3d at 413, 415–419. The Third Circuit noted that historically, there was no such thing as a “stateless” person or corporation, and the Framers of the Constitution “apparently considered the class of ‘subjects or citizens of a for-

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<sup>3</sup> Other countries, besides the United Kingdom, have overseas territories that are potentially subject to the court of appeals’ ruling, including France, the Netherlands, Australia, New Zealand, Denmark, and Norway. The federal district courts within the Second Circuit have indicated that they will apply the court of appeals’ reasoning in *Matimak* to at least some of those territories. See *Inarco Int’l Bank, N.V. v. Lazard Freres & Co.*, No. 97 Civ. 0378(DAB), 1998 WL 427618 (S.D.N.Y. July 29, 1998) (suggesting in dicta that a bank incorporated in Aruba, a Netherlands dependency, may not be allowed to invoke alienage diversity jurisdiction, citing *Matimak*).



eign state' as identical with the class of 'aliens.'" *Id.* at 415–416 (citation omitted). The court evaluated and rejected the *Matimak* court's presumption that a person or entity that is not a British "citizen" could not be a British "subject" for purposes of the alienage diversity statute. *Id.* at 417–18. The court ultimately deferred to the position of the United States and concluded that pre-reversion Hong Kong corporations were "subjects of the United Kingdom for alienage diversity purposes." *Ibid.*

Faced with the Third Circuit's conflicting decision, the Second Circuit, over a strong dissent, has adhered to its holding in *Matimak*. See *Koehler*, 229 F.3d at 187 (denying petition for rehearing en banc). In her dissenting opinion, Judge Sotomayor, joined by Judge Leval, observed:

Because [the Second Circuit] panel decisions have caused a clear split in authority with the other circuit courts, and in light of the potential damage to relations between the United States and the United Kingdom and other nations, it can only be hoped that the Supreme Court chooses to address the resolution of this issue expeditiously.

*Id.* at 193–194 (Sotomayor, J., dissenting from denial of rehearing en banc). See also *id.* at 194 (Calabresi, J., dissenting separately); 229 F.3d at 424 (amending the panel decision to reflect that Judges Cardomone and Newman "feel constrained by the precedential effect of *Matimak* and that "[w]ere the question open in this Circuit, both would rule that citizens of Bermuda and other British Dependent Territories are sufficiently subject to the sovereignty of the United Kingdom to satisfy the alienage clause of the diversity statute").

In short, the courts of appeals are squarely divided on the issue, and that disagreement on a fundamental question of federal court jurisdiction will persist until this Court grants review.

3. The court of appeals' decision additionally warrants review because it is wrong. Judge Sotomayor's dissent from the denial of rehearing en banc in *Koehler* summarizes the defects in the court of appeals' reasoning. See 229 F.3d at 190–193.

The question whether persons or corporations fall within the scope of the alienage diversity statute is, of course, an issue of

federal law. It depends on “whether United States law deems such person or entities to be ‘citizens or subjects’ under our Constitution and statutes for the purpose of alienage jurisdiction.” *Koehler*, 229 F.3d at 190 (Sotomayor, J., dissenting). “As an historical matter, the drafters of the Constitution chose the words ‘citizens’ or ‘subjects’ to refer to the broad category of those under the authority of a foreign power.” *Id.* at 191.<sup>4</sup> Consistent with the traditional and common meaning of those terms, the alienage diversity statute extends federal court jurisdiction to all persons and corporations who are under the authority of a foreign state. See *id.* at 191–192.<sup>5</sup> The Constitution of the British Virgin Islands expressly recognizes the United Kingdom’s continuing sovereignty and dominion over that Overseas Territory. See, e.g., Virgin Islands (Constitution) Order 1976 §§ 3–6, 13, 25, 34, 42–43, 71.<sup>6</sup> Because the citizens and corporations of the British Virgin Islands, like citizens and corporations of Bermuda, “live under

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<sup>4</sup> The dissent noted that in *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809), Chief Justice Marshall equated Article III’s reference to “Citizens or Subjects” of a foreign state with “aliens.” Likewise, the drafters of the Judiciary Act of 1798 treated the Article III terms as synonymous with “aliens” and “foreigners.” See Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78; 1 Annals of Cong. 810, 814, 825 (Joseph Gales ed., 1789) (House debates); see also Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 Harv. L. Rev. 49, 60 (1932).

<sup>5</sup> See *Steamship Co. v. Tugman*, 106 U.S. 118, 121 (1882) (“a corporation created by the laws of a foreign state may, for purposes of suing and being sued in the courts of the Union, be treated as a ‘citizen’ or ‘subject’ of such a foreign state”); see also *The Pizarro*, 15 U.S. (2 Wheat.) 227, 245–246 (1817); *Inglis v. Trustees of Sailor’s Snug Harbor*, 28 U.S. (3 Pet.) 99, 155 (1830) (Story, J. dissenting); see generally *Oxford English Dictionary* (1977) (defining a “subject” as “[o]ne who is under the dominion of a monarch or reigning prince; one who owes allegiance to a government or ruling power, is subject to its laws, and enjoys its protection.”); Noah Webster, *American Dictionary of the English Language* (1828) (defining a “subject” as “[o]ne that owes allegiance to a sovereign and is governed by his laws”); Samuel Johnson, *A Dictionary of the English Language* (1755) (defining a “subject” as “[o]ne who lives under the dominion of another.”).

<sup>6</sup> The British Virgin Islands (Constitution) Order 1976 is reprinted in *Constitutions of Dependencies And Special Sovereignties* (Blaustein ed. 1997), and at the following web-sites: <http://www.gis.gov.vg/GenInfoC/TheLaw/Constitution.htm> and <http://www.viparty.com/constitution/constitution.thm>.

the sovereignty of the United Kingdom,” they “are citizens or subjects of the United Kingdom for purposes of alienage jurisdiction.” *Koehler*, 229 F.3d at 193 (Sotomayor, J., dissenting).

The United States and the United Kingdom, as well as numerous academic commentators, have argued that the Second Circuit’s construction of the alienage diversity statute is fundamentally unsound.<sup>7</sup> That important jurisdictional issue is now squarely before this Court. The Court should resolve the conflict among the courts of appeals and restore the opportunity that Congress has provided for the full range of “citizens and subjects” of foreign states to adjudicate their claims and defenses in a federal forum.

### 3. American Institute in Taiwan

On February 28, 2001 the U.S. District Court for the District of Columbia dismissed a *qui tam* action under the False Claims Act against the American Institute in Taiwan (“AIT”) for lack of jurisdiction because AIT is an instrumentality of the United States government and thus entitled to sovereign immunity, which had not been waived. *United States of America, ex rel. James Wood v. American Institute in Taiwan*, Civil Action No. 98-1952 (D.D.C.) (unpublished opinion). The plaintiff appealed and the United States filed a brief as defendant/appellee on December 7, 2001 in the United States Court of Appeals for the District of Columbia Circuit.

In its appellate brief, the United States explained that the appellant was a political appointee who had served as

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<sup>7</sup> See, e.g., Jonathan Schafer, *Original Intentions and International Reality: States, Sovereignty, and the Misinterpretation of Alienage Jurisdiction in Matimak v. Khalily*, 39 Colum. J. Transnat’l L. 729 (2001); Frank Eric Marchetti, *Alienage Jurisdiction Over Stateless Corporations: Revealing the Folly of Matimak Trading Company v. Khalily*, 36 San Diego L. Rev. 249 (1999); Jennifer L. Coviello, *Access Denied: A Case Comment on Matimak Trading Co. v. Khalily*, 18 N.Y.L. Sch. J. Int’l & Comp. L. 435 (1999); Mark Baker, *Lost in the Judicial Wilderness: The Stateless Corporation After Matimak Trading*, 19 Nw. J. Int’l L. & Bus. 130 (1998); Teresa M. Mozina, *Why is There Any Question? Hong Kong and Alienage Jurisdiction: A Critical Analysis of Matimak Trading Co. v. Khalily and D.A.Y.*, 10 Pace Int’l L. Rev. 575 (1998).

the Managing Director and Chairman of the Board of Trustees of AIT. Following his resignation from that position, plaintiff brought this suit against AIT, its former Chairman and Managing Director, and 20 Doe defendants under the False Claims Act, 31 U.S.C. § 3730(b),<sup>1</sup> in connection with approximately \$5.3 million in supposedly missing visa fee revenues. In addition, he claimed that he had been retaliated against by AIT, in violation of the whistleblower protection provision of that statute, 31 U.S.C. § 3730(h).

The U.S. brief noted that the Government disputed the plaintiff's account of the facts because "a full investigation has revealed that no American Institute funds are actually missing from the U.S. Treasury" and "there has been no nefarious conspiracy within either the State Department or the Justice Department to stifle Wood's case illegitimately." The brief further argued that undisputed statements of fact warranted dismissal of the case as a matter of law on three grounds: 1) lack of a "case or controversy" under Article III of the U.S. Constitution necessary for jurisdiction because AIT is controlled by the President and the Secretary of State and thus the claim impermissibly asks the court to render a judgment in favor of a party against itself; 2) the district court correctly ruled that Congress has not waived the sovereign immunity of AIT to allow a suit against it under the False Claims Act; and 3) AIT is not a "person" within the scope of those that can be liable under the False Claims Act because, "the term 'person' does not include parts of the enacting sovereign, unless the legislature makes clear an intent to cover such entities."

Excerpts provided below from the U.S. brief explain the unique character of AIT under U.S. law and the applicability of sovereign immunity to AIT. Internal references to other submission in the case have been deleted.

The full text of the brief is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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<sup>1</sup> The False Claims Act establishes civil penalties for "[a]ny person" who "knowingly presents, or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." 31 U.S.C. § 3729(a)(1). Such a "person" is "liable to the United States Government for a civil penalty," plus "3 times the amount of damages which the Government sustains." *Id.* at § 3729(a).

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## II. Statement Of The Facts

### A. The Taiwan Relations Act and the Establishment and Operation of the American Institute in Taiwan

The Taiwan Relations Act (22 U.S.C. §§ 3301, *et seq.*), which established the American Institute, is at the heart of this case, and an understanding of its development and its terms is therefore essential for this appeal. This statute grew out of the peculiar relationship among the United States, Taiwan, and the People's Republic of China.

1. The American Institute is a unique entity created by statute in 1979, so that the United States Government can manage its relations with Taiwan (recognized by some as the "Republic of China") after it recognized the People's Republic of China as the sole legal government of China, each of which for years (prior to the creation of the American Institute, as well as thereafter) claimed to be the sole legitimate government of China and the Chinese people. (Taiwan is the principal area administered by the "Republic of China" since it abandoned the mainland of China in 1949.)

\* \* \* \*

While severing official ties with the Republic of China, Congress and the President nevertheless wished to "maintain peace, security, and stability in the Western Pacific \* \* \*." 22 U.S.C. § 3301(a)(1). The United States sought "to promote the foreign policy of the United States" by ensuring "the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan." 22 U.S.C. § 3301(a)(2). See *Mingtai Fire & Marine Insurance Co., Ltd. v. United Parcel Service*, 177 F.3d 1142, 1145 (9th Cir.), *cert. denied*, 528 U.S. 951 (1999). By establishing diplomatic relations with the People's Republic and unofficial relations with Taiwan, the United States could effectively manage its dealings with both entities, while maintaining a "one China" policy, essential to peace and stability in the region.

Thus, there is no United States ambassador or embassy in Taiwan, and no formal government-to-government relations between the United States and Taiwan. Rather, as explained next, the extensive relations between the United States and Taiwan are carried out through the American Institute in Taiwan, a truly unique institution designed to promote United States interests in Taiwan.

2. The Taiwan Relations Act established the statutory framework for relations with the people on Taiwan. Through this statute, the United States created the American Institute, as a non-profit corporation. As this Court has explained, the American Institute was meant as a means by which “[r]elations between the United States Government and the authorities on Taiwan are conducted \* \* \*.” *Goldwater*, 617 F.2d at 700 n.3 (citing the Taiwan Relations Act).

Accordingly, as a result of foreign policy necessity, the American Institute was created by Congress and the President as a “nonprofit corporation incorporated under the laws of the District of Columbia” (see 22 U.S.C. § 3305(a)(1)).<sup>2</sup> This entity serves as the mechanism by which the United States Government can maintain an effective substantive relationship with the authorities on Taiwan while at the same time enabling diplomatic relations with the People’s Republic of China. Indeed, President Carter directed that “[e]xisting international agreements and arrangements in force between the United States and Taiwan shall continue in force and shall be performed and enforced by departments and agencies beginning January 1, 1979, in accordance with their terms and, as appropriate, through [the American Institute].” *Relations With the People on Taiwan, Memorandum for All Departments and Agencies*, reprinted in 1979 U.S. Code Cong. & Admin. News 36, 75, §§ (B) and (D) (December 30, 1978).

Given the exceptional importance of the relations between the United States and the People’s Republic of China, the American

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<sup>2</sup> The legislative history of the Taiwan Relations Act reveals that a conference substitute bill expressly rejected a proposed Senate amendment that would have stated that the American Institute shall not be an agency or instrumentality of the United States; Congress instead provided merely that the American Institute should be a “nongovernmental entity.” H.R. Rep. No. 96-71, 96th Cong., 1st Sess., 16 (1979), reprinted in 1979 U.S. Code Cong. & Admin. News 100.

Institute is thus at the vortex of a critical and delicate foreign policy relationship for this country.

Not surprisingly, therefore, and of considerable importance to this case, Congress provided that “[p]rograms, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through [the American Institute].” 22 U.S.C. § 3305(a). Further, when the laws of the United States authorize or require the United States to “perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the [American] Institute.” *Id.* at § 3305(b).

These statutory provisions mean that the American Institute is the mechanism through which the United States Government conducts foreign relations involving Taiwan, and does so “in the manner and to the extent directed by the President.”

\* \* \* \*

## ARGUMENT

\* \* \* \*

### II. The District Court Correctly Dismissed This Case Because Congress Has Not Waived The Sovereign Immunity Of The American Institute.

\* \* \* \*

... Congress established the American Institute in the Taiwan Relations Act in 1979, pursuant to a backdrop of clear Supreme Court instructions that waivers of sovereign immunity will not be implied, but must instead be unequivocally expressed by Congress. See *United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992). Congress is deemed to be well aware of Supreme Court precedent regarding statutory construction, and to legislate with such case law in mind. See *McNary v. Haitian Refugee Center*, 498 U.S. 479, 496 (1991).

In this instance, there should be little doubt that the district court correctly concluded that sovereign immunity covers the American Institute (fn. omitted). As discussed previously, this entity serves a crucial governmental foreign affairs function, operates with federal funds and revenue generated by activities in its capacity as an agent of the Federal Government, and carries out its functions under close supervision and control by the Executive Branch. In addition, acts performed by the American Institute's employees are valid as a matter of law, and have the same force and effect as if performed by authorized persons under U.S. law. 22 U.S.C. § 3306(b). And, this body is exempt from federal, state, or local taxation. *Id.* at § 3307(a). Finally, federal agencies are authorized to provide services to the American Institute, and vice-versa, and the Comptroller General of the United States has access to this entity's books and records, as well as the opportunity to audit its operations. *Id.* at § 3308.

Under such circumstances, Wood cannot quarrel reasonably with the district court's conclusions that the American Institute serves the interests of the United States Government, is funded by the Government, is closely controlled by the Government, and "as an arm or instrumentality of the government, \* \* \* has the same need for protection from suit, via sovereign immunity, as the government".

As the district court pointed out, given the purposes of the False Claims Act, it would have been quite odd for Congress to have meant to waive immunity and subject the American Institute to False Claims Act liability. Such actions would largely move funds from one part of the U.S. Treasury to another, since "any impairment of AIT's capital will necessarily be replaced out of the public treasury". The only party who would benefit financially from such an action would be the *qui tam* relator, siphoning off a portion of the money as it moved within the Treasury.

\* \* \* \*

. . . Wood's position is that Congress meant a private party to be able to sue the American Institute just as any person can sue a private company, even though this entity is carrying out the foreign relations of the United States with Taiwan—deeply con-



cerned at all times with the effect of its actions on the critical relationship between the United States and the People's Republic of China—under the direction and control of the Executive.

However, as the district court pointed out, Congress provided that the law of the District of Columbia or any State in which the American Institute is incorporated or does business is preempted if it “impedes or otherwise interferes with the performance” of the entity’s functions. 22 U.S.C. § 3305(c).

There is no question that reading District of Columbia law to allow suits against the American Institute in the same way as against private corporations would impede or interfere with the performance of its function. See *Brown v. Secretary of the Army*, 78 F.3d 645, 650 (D.C. Cir.), *cert. denied*, 519 U.S. 1040 (1996). Thus, Congress preempted District of Columbia law to the extent that it might otherwise waive sovereign immunity.

\* \* \* \*

. . . The American Institute is clearly a unique entity—there is *no* other instrumentality like it because there is no other situation in which important foreign relations of the United States must be conducted through a private corporation under the gaze of another substantial foreign power jealous of its status. Any argument about Congress’ intent regarding the American Institute cannot disregard this critical point.

\* \* \* \*

In sum, the district court here properly concluded that Wood’s suit is barred by sovereign immunity. That conclusion is supported by provisions of law in the Taiwan Relations Act, the bylaws of the American Institute, the False Claims Act, and general principles concerning the scope of sovereign immunity. Wood’s argument that further factual development in the district court was necessary is wrong since no amount of factual development would change the fact that the American Institute operates under the control of the Executive, receives substantial funding from the Federal Government, and carries out governmental foreign affairs functions.

\* \* \* \*

## **B. STATUS OF CONSTITUENT ENTITIES**

Puerto Rico, long an unincorporated territory of the United States, in 1952 acquired status as a “commonwealth” under which the U.S. federal government continues to be responsible for the conduct of foreign relations affecting Puerto Rico. This status presents legal issues from time to time in relationships between Puerto Rico and regional or international organizations. During 2001, for instance, in response to an inquiry from the World Bank, the Department of State advised the Bank that Puerto Rican involvement in its activities would need to be vetted with the Department on a case-by-case basis to avoid situations in which Puerto Rico’s participation might be inconsistent with United States foreign policy. The relevant issues are discussed in the exchanges discussed below.

### **1. Associate Membership: Puerto Rico**

In a letter of June 29, 2001 to Governor Calderon of the Commonwealth of Puerto Rico, C. David Welch, Assistant Secretary of State for International Organizations, provided the views of the United States federal government on a proposal by Puerto Rico to join the Association of Caribbean States (“ACS”) as an associate member:

\*   \*   \*   \*

The United States federal government has supported Puerto Rico’s participation in international organizations and bodies whenever possible, in particular when it has deemed that such participation would not be inconsistent with U.S. Government interests or the overall conduct of U.S. foreign policy, or when it would not involve assuming commitments that would affect the U.S. federal government.

The Department of State recognizes that the Commonwealth of Puerto Rico has a special interest in Caribbean regional activities and organizations and appreciates the Commonwealth’s view that membership in the ACS could be of benefit in many ways. Nevertheless, our review of the ACS Charter suggests that asso-

ciate membership would entail certain commitments, including the payment of dues, that could be considered binding under international law. Such commitments would have implications for the U.S. federal government and therefore would require further consideration and possibly consultations with the U.S. Congress. Moreover, we understand the ACS is at least in part a political organization, as a result of which it could be difficult for the Commonwealth—were it to become an associate member—to avoid direct participation or perceived association with ACS policies or positions that might be incompatible with current U.S. foreign policy. Accordingly the Department of State finds that Puerto Rico's membership in the ACS does not appear to fall within the established parameters for Puerto Rican participation in international organizations.

As a matter of longstanding practice, the Commonwealth of Puerto Rico and the U.S. Department of State have held consultations with respect to initiating efforts to participate in an international organization or entity whenever the Commonwealth perceives that such participation would be in its interest. In keeping with this practice, we would welcome the opportunity to meet with representatives of the Commonwealth to discuss these issues. This would enable better mutual understanding of our respective interests and objectives and allow for the establishment of effective procedures to coordinate views of interest to Puerto Rico that involve foreign relations.

\* \* \* \*

## **2. Information-sharing Agreement: Puerto Rico**

Considerations relevant to Puerto Rico's access to the information data base of a regional organization are addressed in excerpts from a memorandum of July 12, 2001, by Paolo Di Rosa, Assistant Legal Adviser for Western Hemisphere Affairs, U.S. Department of State.

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## **Legal Status of Puerto Rico & Background Issues**

Puerto Rico is an unincorporated territory of the United States with commonwealth status. The U.S. federal government has full

responsibility for the conduct of foreign relations of all areas subject to United States jurisdiction, including all U.S. states, territories, and possessions. Accordingly, the State Department reviews any proposed participation by . . . Puerto Rico in international bodies to ensure that such participation would be consistent with the overall foreign policy of the United States, and that it would not result in assumption by the United States of undesirable or inconsistent international commitments, including binding obligations under international law.

The United States federal government has been supportive of Puerto Rico's participation in international organizations and bodies where appropriate in accordance with the above-mentioned criteria. The Department of State has recognized, for example, that the Commonwealth of Puerto Rico has a special interest in Caribbean regional activities and organizations, and has on occasion permitted Puerto Rico to join organizations of a regional character that the U.S. is not interested in joining itself (e.g., the Caribbean Tourism Organization). Although we recognize that there are cultural ties that unite Puerto Rico with Latin American countries, proposals to enter into agreements outside of the Caribbean region merit special consideration to ensure there is no inconsistency with U.S. foreign policy.

\*   \*   \*   \*

As a matter of longstanding practice, Puerto Rico and the U.S. Department of State have held consultations with respect to the interest of Puerto Rico in participating in, or establishing a relationship with, an international organization or entity. . . . The Department has recently informed [the Governor] that we would welcome the opportunity to meet with representatives of the Commonwealth to establish effective and expedient procedures to coordinate views regarding matters of interest to Puerto Rico that involve foreign relations.

. . . [It] does not appear that Puerto Rico could participate formally in [the organization at issue] in any capacity. Even if it were possible, it is difficult to envision the USG acquiescing in participation by Puerto Rico in an organization from which the U.S. would itself be barred by the terms of the Charter or other governing document.

However, we understand the proposal here to be limited to a request for “an information-sharing agreement,” rather than to formal participation by Puerto Rico in the organization in any capacity. I can discern no legal objection in principle to the notion of enabling Puerto Rico access to [the organization’s] information data base. However, there might be legal issues or objections in regard to any proposed written “agreement” to effect such an arrangement, including any obligations assumed therein by Puerto Rico which could also be binding on the U.S. For example, the concept of “information-sharing” implies that Puerto Rico would itself provide information to [the organization] and its members, which would require review by the USG to determine whether such provision would entail a commitment to share information over which the federal government exercises control, or of which it has interest in restricting dissemination.

As noted, the U.S. federal government has prerogative with regard to any international agreements that affect the U.S. or its constituent units, including territories such as Puerto Rico. Accordingly, the Department would need to review and approve any proposed written document that purports to delineate the terms of the information-sharing arrangement.

### **Cross References**

*President’s ability to enter into executive agreements, Chapter 4.A.2.*  
*Role of States of the U.S. in international agreements, Chapter 4.A.1.*  
*Applicability of treaty obligations in U.S. federal system, Chapters 3.B.5.b. and 11.E.3.*



## CHAPTER 6

# Human Rights

### A. GENERAL

#### Country Reports on Human Rights Practices

On February 26, 2001, the Department of State published the 2000 Country Reports on Human Rights Practices, in compliance with §§ 116(d) and 502B(b) of the Foreign Assistance Act of 1961, as amended, and § 504 of the Trade Act of 1974, as amended. The report is available at [www.state.gov/g/drl/rls/hrrpt/2000/](http://www.state.gov/g/drl/rls/hrrpt/2000/). These reports are often cited as a source of U.S. views on various aspects of human rights practice in other countries.

### B. DISCRIMINATION

#### 1. Race

##### *a. Convention on the Elimination of All Forms of Racial Discrimination report*

On August 3, 2001, Michael E. Parmly, Principal Deputy Assistant Secretary for Democracy, Human Rights and Labor, Department of State, and Ralph F. Boyd, Jr., Assistant Attorney General for Civil Rights, Department of Justice, appeared before the Committee on the Elimination of Racial Discrimination to present the initial report of the United States under the terms of the Convention on the Elimination

of All Forms of Racial Discrimination. On August 6, Mr. Boyd and Lorne Craner, Assistant Secretary of State for Democracy, Human Rights and Labor, appeared to answer questions from the Committee. (*See also Digest 2000*, Chapter 6.B.1.).

The presentation of August 3 and replies to questions on August 6 are available at <http://usinfo.state.gov/usa/race/texts.htm>. The Report had been transmitted to the Committee on September 21, 2000 and is available at [www.state.gov/www/global/human\\_rights/cerd\\_report/cerd\\_report.pdf](http://www.state.gov/www/global/human_rights/cerd_report/cerd_report.pdf).

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### Michael E. Parmly

Over the past half century, the United States has taken several major steps to reverse the racial segregation and discrimination that had previously been prevalent in many parts of the country. In doing so, progressively and in several discreet stages, we have deliberately and carefully constructed a solid legal framework to fight racism and racial discrimination.

\*   \*   \*   \*

. . . [T]he United States takes its obligations under the Convention on the Elimination of All Forms of Racial Discrimination very seriously. Ratification of the Convention was an important milestone for my country, and the United States fully supports the goals of the Convention. In many important respects, the Convention restates the most important objectives of our domestic civil rights laws.

\*   \*   \*   \*

I believe that it is necessary to address one controversial aspect of Article 4 of the CERD. I want to discuss, in brief, why the United States felt obliged to take a reservation on the language of Article 4 that requires state parties to “declare an offense punishable by law all dissemination of ideas based on racial superiority or hatred . . . and all other propaganda activities. . . .”

The first, most obvious point is that our reluctance to make such activities criminal should not in any way be taken as sup-



port for racist views and propaganda. The fact is, however, our First Amendment protects free speech without regard to content. That said, speech that is intended and likely to cause imminent violence can be restricted under our Constitution. These First Amendment protections have been so strongly supported throughout our history by our people and an extensive body of jurisprudence, that we do not believe this to be an appropriate measure for us to take.

Rather, we have always relied on the marketplace of ideas as the best way to expose objectionable views for what they really are. Yes, this may lead to some ugly statements in the short-term. But over time, we believe that the bankruptcy of racist views becomes clear for all to see.

\* \* \* \*

**Ralph F. Boyd, Jr.**

\* \* \* \*

Our purpose today is to summarize for the Committee the legislative, judicial and administrative measures that are already in place in the United States, and that are intended to advance the goal of achieving a racially and ethnically integrated society that provides equal, meaningful opportunities for all of our people. I will also outline for the Committee some of the steps that the United States will undertake over the course of the next several years to further ensure that all people in America are, in the words of Article 2(2) of the Convention, guaranteed the full and equal enjoyment of human rights and fundamental freedoms. We also look forward to answering the Committee's questions, and, later, to receiving the Committee's recommendations for further improvements in our country's civil rights record.

### **III. Our civil rights infrastructure**

The United States began to take serious steps to fight racial injustice in the middle of the last century. Since that time, we have embarked on a steadily-increasing effort to eradicate discrimination on the basis of race. In many important respects, the civil rights

laws and social programs we have adopted have served as models throughout the world.

All three branches of the United States government have been actively involved in what can fairly be characterized as a comprehensive and thorough effort to attack racism and its legacies. The legislative branch—the United States Congress—has enacted far-reaching civil rights laws. In 1964, the Congress passed the Civil Rights Act, which outlawed discrimination in public accommodations, employment and education. That Act was among the most significant pieces of legislation ever enacted in American history. It has had a wide-ranging impact on our society, and has served as a model for many subsequent civil rights statutes.

The following year, the landmark Voting Rights Act was enacted. This seminal legislation prohibits discrimination by public officials in the voting process. The Voting Rights Act has—along with voter registration campaigns—accelerated the participation of African-Americans in the American political and electoral processes. This is especially true in many of our southern states, where increased minority participation in the political process has led to dramatic changes in our nation's political institutions. The Civil Rights Act of 1964 and the Voting Rights Act of 1965 laid the groundwork and provided a framework for many other civil rights statutes. Americans are now assured that, in nearly every significant aspect of their lives, laws exist to protect against discrimination on the basis of race or ethnicity, whether it involves deciding where to live, financing a home, obtaining credit, getting a job, securing an education, or traveling anywhere in America.

Moreover, the United States Congress has passed significant additional legislation to achieve even greater protection of civil rights for all Americans. To cite just a few examples, I note the following:

- The Americans with Disabilities Act prohibits discrimination against people with disabilities in public accommodations, employment, and access to government services;
- The Age Discrimination in Employment Act protects people who are 40 years of age or older from adverse job actions against them because of their age;

- The Civil Rights of Institutionalized Persons Act protects people who are in government nursing homes or prisons;
- The Immigration Reform and Control Act prohibits employment discrimination against certain categories of immigrants and refugees; and,
- The Individuals with Disabilities in Education Act protects students with disabilities in educational settings.

In sum, the legislative branch of the United States Government has constructed a comprehensive and aggressive statutory framework for protecting the civil rights of all people in America.

The executive branch of the United States government is actively involved in enforcing these laws. The Department of Justice's Civil Rights Division, which I now head, is one of six litigating divisions in the Department of Justice. This Division is responsible for enforcing many of these civil rights laws. The Equal Employment Opportunity Commission likewise plays a critical role in this effort; its more than 2,500 employees are charged with ensuring that private employers abide by federal nondiscrimination laws. Since its founding, the EEOC has obtained over \$2.2 billion in monetary relief for parties bringing discrimination charges against their employers.

In addition, every federal agency, and most state agencies, now have equal employment opportunity offices to ensure that the agency does not discriminate and complies with applicable federal and state anti-discrimination laws. Virtually all federal agencies that provide federal financial assistance have civil rights compliance offices that are responsible for ensuring that recipients of federal financial assistance do not engage in unlawful discrimination. States also have civil rights agencies that enforce the extensive nondiscrimination laws enacted by their respective state legislatures. In addition, many cities and other local government entities have local civil rights ordinances and enforcement personnel to ensure that those laws are enforced.

In summary, the legislative branch's efforts to craft comprehensive civil rights laws have been matched by the executive branch's efforts to create structures that can, should, and will effectively enforce these laws. Over ten thousand federal, state and local employees actively enforce civil rights laws in the United

States. Finally, the judicial branch has played an independent and equally important role in combating racial discrimination in America. In 1954, the Supreme Court issued a landmark decision in *Brown v. Board of Education of Topeka* (1954), banning state-sponsored racial segregation in public education. This historic decision signaled the emergence of the contemporary civil rights movement in our country. The Supreme Court continues to play a leading role in interpreting the U.S. Constitution's prohibition against discrimination. Under our Constitution, government must make every effort to implement policies and programs that treat every American fairly, without regard to race or ethnicity.

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#### **IV. Where we still need to make progress**

Notwithstanding this progress, there obviously are areas where we must redouble our efforts.

Racial discrimination continues to be a problem that must be confronted in our country. Race is too often a factor in decisions related to whether to rent a home to a person of another racial or ethnic group, whether to hire an applicant for a job, and whether to stop and question a person suspected of committing a crime. As U.S. Assistant Attorney General for Civil Rights, my job is to help lead the fight against such discrimination, and I pledge to do so vigorously.

\*   \*   \*   \*

#### **V. The United States' agenda**

Any vision of a fair and just society requires that these gaps between racial and ethnic groups be addressed effectively, and the United States is determined to do so. I want to outline for the Committee some of the significant steps the United States intends to undertake over the course of the next several years to further ensure that all of our people are, in the words of Article 2(2) of the Convention, guaranteed the full and equal enjoyment of human rights and fundamental freedoms.

\* \* \* \*

. . . [T]he vigorous protection of the civil rights of all people is . . . essential to eliminating racial discrimination and its lingering effects. Therefore, one of the first and foremost civil rights priorities of this Administration is voting rights reform. The well-publicized voting irregularities that took place in many of our states during the 2000 elections have gained international attention. The Attorney General of the United States has announced a major new voting rights initiative. It has two principal objectives: (1) preventing abuses of voting rights by eliminating barriers to voting before elections are held; and (2) prosecuting individuals or institutions who disenfranchise would-be voters by unlawfully preventing them from exercising this important franchise, or by engaging in outright voting fraud. . . .

Recognizing that even the most laudable prevention efforts may not always be enough to insure fairness, the Department is fully committed to prosecuting vigorously allegations that any American has been excluded unlawfully from polling places, or otherwise unlawfully prevented from voting. . . .

Second, the Bush Administration is committed to eliminating the practice of racial profiling. . . .

Third, the Administration will also emphasize the enforcement of our fair housing laws. When members of racial and ethnic minority groups seek to rent apartments, buy new homes, or secure mortgages or mortgage insurance, they are entitled, morally and legally, to fair and equal treatment. . . .

Fourth, the Administration will protect new immigrants to America by vigorously prosecuting those who exploit their vulnerability. . . . An unacceptably high number of newcomers to America suffer at the hands of unscrupulous employers who pay sub-minimum wages or force employees to work in unsafe conditions. These problems are especially pronounced among those who come to our country without legal authorization.

The problem of trafficking in persons is especially severe. Estimates indicate that 50,000 persons, primarily minority women and children, are trafficked into the United States each year. These vulnerable people are subjected to modern-day slavery and often forced to work against their will in the sex trade. The Attorney

General has made it a priority to stop the trafficking of human beings. As Assistant Attorney General and head of the Civil Rights Division of the Department of Justice, I will co-chair an inter-agency task force responsible for leading this effort. Trafficking in persons is an international problem, one which the Department of Justice and the Department of State stand ready to work with other governments to address.

\* \* \* \*

The United States government also has engaged in historic negotiations with Mexico to ensure that people coming across our southern border illegally are treated humanely. President Bush and Mexican President Vicente Fox have established a number of critically important initiatives, and cabinet members from both governments are meeting regularly to implement these new policies and programs.

The final civil rights policy initiative I want to share with you today is President Bush's New Freedom Initiative. The New Freedom Initiative is a comprehensive set of proposals designed to help increase access for Americans with disabilities to innovative new technologies that will facilitate their more full and active participation in our society, expand their educational opportunities, better integrate them into the workforce, and promote full access to, and involvement in, community life. The New Freedom Initiative builds on the successes of the landmark Americans with Disabilities Act. The President already has signed an executive order directing that Cabinet officials provide community-based services for people with disabilities, who currently are only able to receive needed services in an institution setting. . . .

\* \* \* \*

**Reply of the United States to Questions from the Committee  
on the Elimination of Racial Discrimination**  
[Identification of specific questioners has been omitted.]

\* \* \* \*

*Q: What is the official view of the United States with respect to the legal status of treaties with Indian tribes? Does the United States regard such treaties as international treaties to which the United States is a party?*

A: The United States Supreme Court has held that “the power to make treaties with the Indian Tribes is, as we have seen, coextensive with that to make treaties with foreign nations.” *United States v. 43 Gallons of Whiskey*, 93 U.S. 188 (1876). That said, while Indian treaties often recognize the sovereignty of Indian tribes, Indian treaties differ from foreign treaties. Under U.S. law, Indian tribes are “domestic dependent nations.” There is a special trust relationship between these nations and the United States. There are likewise special canons of construction, recognized and utilized by the United States Supreme Court, that require that Indian treaties be construed in favor of the Indians. These rules are based upon a unique trust relationship between the United States and Indian tribes. They do not apply to international treaties.

*Q: What is the position of the United States with respect to Congress’s power to unilaterally amend or rescind treaties with Indian tribes?*

A: Indian treaties can be abrogated unilaterally by Congress, if Congress clearly expresses an intent to do so. The United States Supreme Court has adopted several special canons of construction for Indian treaties which, taken together, create a strong presumption that treaty rights have not been abrogated or modified by subsequent congressional enactments. These rules, variously stated, establish that Congress must show a “clear and plain” intention to abrogate Indian treaty rights before any Congressional action will be determined to have abrogated such rights.

*Q: Why hasn’t the United States incorporated the provisions of the Convention directly into U.S. domestic law?*

A: Nothing in the Convention requires States Parties to incorporate the provisions of the Convention directly into their domestic law. It is a basic principle of international law and practice that it is up to party States to determine how best to implement their obligations under international agreements.

In the United States, we have chosen to implement our international treaty obligations by passing implementing legislation when necessary. As we have indicated in our report, at the time of ratification it was determined that U.S. law was in compliance with our obligations under the Convention. Accordingly, no implementing legislation was necessary.

The real question, of course, is not whether the Convention should or should not be directly incorporated into U.S. law, but whether the obligations accepted by the United States in adhering to the Convention are, in fact, guaranteed to people within the United States. The U.S. September 2000 report drafted by the previous Administration makes clear that current U.S. laws and policies comply with the obligations of the United States under the Convention, and this Administration has had no occasion to question that conclusion.

*Q: In light of the principle that a State cannot rely on the independence of its judiciary as a justification for non-compliance with its treaty obligations, how does the United States respond to the Committee's concern that certain decisions of the U.S. Supreme Court, particularly in the area of racist speech, have "complicated" U.S. compliance with the Convention?*

A: The United States has not disputed the proposition that a State cannot rely on the independence of its judiciary to justify a failure to comply with its treaty obligations, and indeed, the U.S. remains in compliance with its obligations under the Convention. With regard to the two examples cited by the Committee, decisions of the U.S. Supreme Court have neither complicated compliance with its obligations nor jeopardized such compliance.

First, as the Committee knows, the United States took a reservation to the Convention whereby it accepted no obligation under Article 4 of the Convention that conflicts with constitutional limitations on restrictions of freedom of speech and association. Hence, to the extent the Supreme Court of the United States interprets and applies constitutionally permissible restrictions on speech, it also determines the contours of Article 4.

Second, Article 2 permits special measures to promote the advancement of certain racial or ethnic groups. In the United States, the constitutionality of one particular form of special measure—race-conscious remedies—has been debated for many years, and indeed continues to be the subject of robust and healthy debate in the context of our internal discussions about legal, social, and economic justice for all of America's people. As is indicated in our report, this debate has taken place and been particularly sharply focused within a complex landscape involving numerous U.S. Supreme Court decisions on the issue. In fact, a major case



involving such race-conscious measures is currently pending in our Supreme Court. The case is titled *Adarand Constructors, Inc. v. Mineta*; we expect that the *Adarand* case will further articulate the constitutional standards to be applied in this area under U.S. law. However, as the U.S. September 2000 report makes clear at paragraph 249, Article 2 imposes no obligation on States parties to utilize race-conscious remedies per se, or any other particular form of special measure. Accordingly, the Supreme Court's decision will not affect U.S. obligations under the Convention.

*Q: What is the United States' position with respect to concerns about the disparate treatment of racial and ethnic minorities in the American criminal justice system, with specific respect to racial profiling, mandatory minimum sentencing, disproportionate incarceration levels, and penalties for crack and powder cocaine? What is this Administration doing to address these disparities?*

A: The United States strongly condemns disparate treatment of racial and ethnic minorities. This is especially the case with respect to our criminal justice systems. Discrimination on the basis of race or ethnicity within our criminal justice systems is prohibited in the United States.

The Supreme Court has already held that what we recently have come to refer to in America as "racial profiling" is unconstitutional. In *Whren v. United States* (1996), the Court stated with a unanimous voice that "the Constitution prohibits selective enforcement of the law based on considerations such as race" under the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment applies to all of our 50 states; the Fifth Amendment applies the same prohibitions to the federal government. Our federal law has long empowered aggrieved people to file civil lawsuits seeking redress for violations of the Constitution, under what is known in U.S. law as Section 1983—that is, Section 1983 of Title 42 of the United States Code. Federal courts have permitted Section 1983 suits to proceed against police officers who engage in racial profiling practices on numerous occasions, and many plaintiffs have already settled their claims for substantial money damages. In addition, the federal government seeks to ensure compliance with the constitutional requirement of nondiscrimination by conditioning federal funds for state and local law enforcement agencies on commitments not to engage

in discrimination. Finally, the United States Department of Justice can bring legal actions to enforce those protections, pursuant to Title 42, Sections 3789d(c)(3) and 14141 of the United States Code, and it has done so—and I can assure this Committee that it will continue to so do if and when necessary.

\* \* \* \*

*Q: Please also discuss the Bush Administration's efforts to combat police brutality, racial profiling, prejudice within police departments, and less aggressive prosecutions of cases involving black victims.*

A: Discrimination on the basis of race or ethnicity within the criminal justice system is prohibited in the United States. All Americans have the constitutional right to be free of excessive force and racially discriminatory police and prosecutorial conduct. This Administration fully intends to investigate and, where appropriate, prosecute cases in which police brutality or racial profiling has occurred.

Civil Rights Division lawyers are empowered by statute to undertake these prosecutions. We are aided in this effort by Assistant U.S. Attorneys (federal prosecutors) from the 94 U.S. Attorneys' offices that are spread out across the United States. For example, working with Assistant U.S. Attorneys in Los Angeles, Civil Rights Division lawyers used Title 18, Section 242 of the United States Code to prosecute, convict, and incarcerate the police officers involved in the beating of Rodney King, an African American man who had led police on a long car chase through Los Angeles. The Department of Justice investigates about 2,500 reports of police misconduct every year.

In addition to criminal prosecutions, as I mentioned earlier the federal government takes an active role in preventing police misconduct by bringing lawsuits against law enforcement agencies that engage in a pattern or practice of police misconduct. The Department of Justice also provides frequent training to police organizations, emphasizing the serious repercussions for violating basic constitutional rights and stressing that criminal law enforcement must be performed in a nondiscriminatory and fair manner. Moreover, the federal government has also investigated police organizations, several of which have resulted in the adoption of new policies and monitoring procedures designed to reform management practices on a department-wide basis in order to

help prevent misconduct, such as the excessive use of force and racial profiling in conducting traffic stops. For example, in 1999, the Department of Justice filed suit alleging a pattern or practice of racial discrimination by the New Jersey State Police, and simultaneously entered into a settlement with the state that provides comprehensive remedies aimed at eliminating police practices that discriminate against racial and ethnic minorities.

A good example of the use of both criminal and civil remedies to combat police misconduct involves several New York City police officers who recently brutally assaulted a black detainee. Just this past year, the officers were convicted criminally in a New York federal court on federal civil rights charges. The officer who initiated the assault was sentenced to 15 years, 8 months in federal prison, without the possibility of a parole. He also was ordered to pay more than 25 million dollars in restitution. As a supplement to the criminal convictions of several police officers, a multi-million-dollar settlement recently was announced in the civil lawsuit brought against the police department by the victim of the police attack.

*Q: What is the United States position with respect to racial disparities in the application of the death penalty to blacks, including black juveniles?*

A: The United States Constitution and federal law impose strict protections to ensure that race does not affect or influence decisions concerning whether to impose the death penalty. Federal law expressly prohibits the imposition of the death penalty on the basis of race, and requires that each capital case be considered on an individual basis. These prohibitions against racial discrimination apply not only to prosecutors and judges as government officials, but also to jurors, each of whom is a private citizen. For example, Section 3592(f) of Title 18 of the United States Code specifically requires that the judge presiding over a capital case instruct the jury deliberating about a death sentence not to consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim, and not to recommend a sentence of death unless it would have recommended that sentence for the subject crime regardless of such criteria. In addition, federal law further requires that, when returning a verdict, each deliberating jury submit a certificate, signed by each juror, declaring that his

or her decision was not based on discriminatory criteria, and that he or she would have made the same recommendation regardless of the race, color, religious beliefs, national origin, or gender of the defendant or victim. Any juror who makes a false statement on this certification may be criminally liable under our perjury laws, and subject to punishment of up to 5 years imprisonment and a \$250,000 fine.

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*Q: What is the United States position on its 1863 treaty with the Shoshone tribe? Is the United States discriminating in the protection of property rights with respect to the tribe, including seizing the tribe's lands and allowing the land to be used for dumping radioactive material?*

As is the case with the Shoshone, many Native American tribal land claims are based on aboriginal title that creates enforceable property rights in tribes against third parties or states. The doctrine of aboriginal title is a judicially created doctrine rooted in colonial concepts of property ownership that arose from conflicting claims between the European colonists and Native Americans over land which was lightly populated due to the migratory nature of some tribal lifestyles. The claims were first addressed in the U.S. Supreme Court decision *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 574 (1823), which held that as a result of European discovery, the Native Americans had a right to occupancy and possession, but that tribal rights to complete sovereignty were necessarily diminished by the principle that discovery gave exclusive title to those who made it. As a result, the tribes' ability to sell or convey the property was subject to the approval of the sovereign.

Subsequent cases reaffirmed that the tribes retained enforceable property rights against third parties or states. See *United States ex rel. Hualpai Indians v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). Aboriginal title also can carry with it enforceable hunting, fishing and other usufructary rights confirmed by recent U.S. Supreme Court decisions. While not protected under law by the Fifth Amendment to the U.S. Constitution, Congress has taken measures to compensate tribes directly for the taking of aboriginal rights. Congress, in 1946, established the Indian

Claims Commission (ICC), specifically to resolve Indian claims against the federal government that rested on a variety of bases, including claims based on aboriginal title that might not otherwise be compensated at law.

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*Q: How does the United States respond to allegations that the denial of the claims of Alaskan Natives to their ancestral lands is racial discrimination?*

A: The United States recognized claims by Alaska Natives to lands in the State of Alaska in the Alaska Native Claims Settlement Act of 1971. This Act was adopted by the United States Congress in response to the United States Supreme Court's decision in *Tee-Hit-Ton Indians v. United States*, 348 U.S. 272 (1955), which held that Alaska Natives' aboriginal title was not compensable under the Fifth Amendment to the United States Constitution. The Act compensates Alaska's 80,000 native inhabitants by providing for the payment of nearly \$1 billion and for the selection, development, and alienation of 45 million acres of land by Alaska Natives. Alaska Natives are also entitled to apply for individual, fee ownership of up to 160 acres of land which they had been using and occupying.

*Q: How would the United States respond to a recommendation by the Committee that it investigate its compliance with its obligations under the Convention at the state and local level?*

A: At the time of ratification it was determined that the United States was in compliance with our obligations under the Convention with regard to those matters that have traditionally been reserved for state regulation. Nevertheless, we recognize the importance of ensuring that state and local law and, more importantly, actual practices at those levels of government, do not fall below the standards set by the Convention.

The Executive Order 13107, entitled "Implementation of Human Rights Treaties," establishes an interagency working group whose purpose is to provide "guidance, oversight, and coordination with respect to questions concerning the adherence to and implementation of human rights obligations and related matters." Among the working group's functions is the development of proposals and mechanisms for improving the monitoring of actions

by the various states to ensure that the Convention is being implemented at the state level. The Working Group regularly considers issues related to the implementation of the Convention—and to other human rights treaties—at the state level.

As the Committee can see from this Initial U.S. Report, federal laws addressing racial discrimination are extensive, complex and multi-faceted. Hence, for our Initial Report, we decided to focus primarily on federal laws that are most directly relevant and responsive to U.S. obligations under the Convention. However, in preparation for our presentation of this report, we contacted state and local officials throughout the fifty states to request information that would assist us in understanding how and the extent to which the Convention is being implemented at the state and local level. We received many encouraging responses, which we are following up on to include in our next periodic report to this Committee.

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*Q: What is the United States's position with regard to inappropriate treatment of undocumented migrant workers?)*

A: The United States government devotes significant resources to combat the mistreatment of immigrants, both documented and undocumented. Under United States law, immigrants, both legal and illegal, enjoy a broad range of rights shared with others in the country, including many constitutional and statutory rights against racial and national origin discrimination. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution protects all persons, not just citizens. The Fair Labor Standards Act, which provides for minimum wages and overtime pay, applies equally to all employees regardless of immigration status. The Agricultural Workers Protection Act provides special economic and other legal protections for those who travel to the United States to perform seasonal agricultural labor. Moreover, emergency medical care and certain non-cash benefits are available to all persons.

In addition to these rights and protections, the Immigration and Nationality Act prohibits employment discrimination based on citizenship status and national origin. The Office of Special Counsel for Immigration-Related Unfair Employment Practices, which I supervise, enforces this Act. Its attorneys work with local

communities to seek out and prosecute those who discriminate based on citizenship status. With regard to education, it is unlawful to deny school children in the United States a free public education on the basis of their immigration status. See *Plyler v. Doe*, 457 U.S. 202 (1982). The Office of Migrant Education (OME) of the United States Department of Education works to improve teaching and learning for the Nation's estimated 700,000 migratory children and youth. Programs and projects that OME administers are designed to enable children whose families migrate to find work in agricultural, fishing, and timber industries to meet the same challenging academic content and student performance standards that are expected of all children. Migrant students also receive educational services under many other Department of Education grant programs.

The United States government has several programs designed to stop violence against immigrants. The Deputy Attorney General of the United States is leading an effort to study the extent and nature, if any, of racial profiling by federal agencies. Criminal prosecutions have also been brought against several Border Patrol officers and Immigration and Naturalization Service officers for misconduct, including abuse of illegal immigrants. The Department of Justice has created an "Informal Mechanism" with the Embassy of Mexico to ensure that allegations of civil rights violations along the Mexican border are given their appropriate attention and adequately addressed by the Department of Justice.

The Border Patrol has initiated several projects to reduce the dangers faced by immigrants crossing the Mexican border. These include the Border Safety Initiative, which is designed to educate migrants about the risks and dangers of crossing the border illegally and to assist those who do not heed the warnings and whose lives and well-being are endangered as a result. Also, Mexican President Vicente Fox and President Bush have pledged to work together to make crossing the United States-Mexico border safer for Mexican and other immigrants. In June 2001, both countries announced their most sweeping effort yet to prevent deaths of migrants. The United States and Mexico will undertake campaigns to warn migrants of risks, and the two countries will crackdown on smugglers who expose migrants to physical harm while crossing the border, and on bandits who prey on the intending migrants while they are still in Mexico.

One of our country's most recent initiatives in this area merits special attention. The Trafficking Victims Protection Act, enacted in October 2000, provides a comprehensive set of tools to combat the trafficking in persons through prevention, prosecution and enforcement against traffickers and by providing assistance for victims. According to estimates, more than 50,000 persons are trafficked into the United States each year. These are typically women or young girls who are forced into domestic servitude or forced into the sex industry. Globally, estimates show that over 700,000 persons are trafficked each year.

The Attorney General has made enforcement of anti-trafficking laws a priority. Since January, the Civil Rights Division of the Department of Justice has prosecuted several trafficking cases. We hope to do more, and are increasing the resources that we allocate to this effort. We likewise believe that victims of trafficking are just that—victims. The Attorney General just last month signed new regulations that require law enforcement officers to treat them as victims, providing them access to medical care and other services. In addition, alien victims of trafficking in persons are now offered new protections from deportation, and through two new visa classifications, the possibility of remaining in the United States.

*Q: What measures do U.S. authorities intend to take to combat the use of the Internet for racist/abusive purposes? In other words, how far can the United States government go without bumping up against the First Amendment? Please give examples of any cases in which such actions have been taken.*

A: Threatening Internet communications directed against individuals because of their race, religion, sex, or national origin may be subject to federal prosecution. The Criminal Section of the Civil Rights Division at the United States Department of Justice prosecutes hate-motivated threats of violence via the Internet under a variety of federal statutes including:

(a) 18 U.S.C. § 875(c), which prohibits interstate transmission of a threat to injure;

(b) 18 U.S.C. § 245, which prohibits, inter alia, intimidating or interfering with any person by threat of force because of his or her race, color, religion, or national origin and because that person is engaging in a protected activity;



(c) 18 U.S.C. § 248, which prohibits, inter alia, intentionally intimidating or interfering with any person by threat of force because that person is or in order to intimidate any person from obtaining or providing reproductive health services;

(d) 18 U.S.C. § 844(e), which prohibits willfully making a threat or conveying false information about an attempt—by mail, telephone or other instrument of commerce—to injure a person or destroy property by means of fire or an explosive;

(e) 42 U.S.C. § 3631, which prohibits intimidating or interfering [with any person] by threat of force because of his or her race, color, religion, sex, handicap, or national origin and because he or she is exercising a housing right;

(f) 47 U.S.C. § 223, which prohibits using a telecommunications device without disclosing one's identity to threaten or harass the recipient of the communication, and prohibits repeatedly calling or e-mailing someone solely to harass that person.

With the Committee's indulgence, I would like to mention two recent examples of prosecutions involving Internet threats. First, in *United States v. Quon*, the defendant pled guilty to interfering with a federally-protected activity after he allegedly sent a racially threatening e-mail through the Internet to forty-two Latino faculty members at California State University at Los Angeles, twenty five Latino students at the Massachusetts Institution of Technology, a college that receives federal funds, and Latino employees at NASA, Indiana University, Xerox, The Hispanic Journal, and the IRS. And in *United States v. Machado*, the defendant, a former student of the University of California at Irvine, was convicted of interfering with a federally-protected activity by disseminating to fifty-nine students, nearly all of whom were of Asian descent, an e-mail containing racially derogatory comments and threats.

Speech that does not amount to a threat, a direct incitement to imminent violence, or a solicitation for illegal conduct is protected by the First Amendment to the United States Constitution and may not be subject to government regulation or punishment.

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*Q: Is the United States considering making a declaration under Article XIV of the Convention [to recognize the competence of*

*the Committee regarding alleged violations of rights set forth in the Convention]?*

A: The United States has no intention at this time of making a declaration under Article 14 of the Convention.

\* \* \*

*Q: Please confirm that state and local laws do not undermine federal laws against discrimination.*

A: It is true that, in our federalism-based system of government, Congress often allows state and local governments to legislate first. However, the major federal antidiscrimination laws apply nationally. Moreover, state and local efforts to combat discrimination frequently strengthen, supplement, and sometimes expand upon federal efforts.

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*Q: What is the status of disparate impact law in the United States today?*

A: As we noted in our September 2000 report, the disparate impact prohibitions embodied in various federal civil rights provisions are consistent with Article 2(1)(c) of the Convention. For example, Title VII of the Civil Rights Act of 1964 prohibits covered employers, including state and local governments, from employment practices which impose an unjustifiable disparate impact on individuals of certain races. Similarly, regulations promulgated pursuant to Title VI of the Civil Rights Act of 1964 similarly forbid practices resulting in disparate impact by recipients of federal funds. These regulations remain in place following the U.S. Supreme Court's recent decision in *Alexander v. Sandoval*, which held only that there is no private right of action to enforce those disparate impact regulations. These regulations are subject to enforcement by the Division of the Department of Justice that I now head.

*Q: What is the justification for the denial of voting rights to residents of the District of Columbia, who are predominantly African-American?*

A: Congress established the District of Columbia in 1801 to assure that the seat of the federal government is subject to exclusive fed-

eral control, pursuant to the express terms of the Constitution. At that time the population of D.C. was approximately 8,000 in number and predominantly White. That same Constitution provided that representation in the national legislature and executive branch be apportioned through the states, not including D.C.

The 23rd Amendment of the Constitution, ratified in 1961, authorizes the District to participate in the election of the President of the United States. And since 1970, the District has been represented in the House of Representatives by a delegate who may serve on standing, special and conference committees with the same powers and privileges of representatives from the states. Residents of the District of Columbia also elect a mayor, and members of the District's city council.

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*Q: A number of federal laws prohibit state and local government programs that receive federal funds. But what about those programs that do not receive federal funds?*

A: First, state governments are required under the Equal Protection Clause of the Constitution not to discriminate on the basis of race in all of its functions. Most state constitutions also contain such provisions. In addition, these federal prohibitions against discrimination apply not only to the specific use of federal funds, but to the entire entity receiving federal funds.

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#### **b. World Conference Against Racism**

On September 3, 2001, Secretary of State Colin Powell instructed the U.S. delegation to return home from the World Conference Against Racism in Durban, South Africa, as set forth below.

The statement is available at [www.state.gov/secretary/rm/2001/4789.htm](http://www.state.gov/secretary/rm/2001/4789.htm).

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Today I have instructed our representatives at the World Conference Against Racism to return home. I have taken this decision with regret, because of the importance of the international fight against racism and the contribution that the Conference

could have made to it. But, following discussions today by our team in Durban and others who are working for a successful conference, I am convinced that will not be possible. I know that you do not combat racism by conferences that produce declarations containing hateful language, some of which is a throwback to the days of “Zionism equals racism;” or supports the idea that we have made too much of the Holocaust; or suggests that apartheid exists in Israel; or that singles out only one country in the world—Israel—for censure and abuse.

I deeply respect the goals of South African President Mbeki and Foreign Minister Zuma in hosting this conference. I strongly support the good work of Secretary General Annan to try to make it come out right. The United States and delegations interested in a successful outcome had worked productively in Durban on the other key issues of the Conference and were hopeful that they could be resolved. I wish that it could have turned out more successfully.

***c. Proposed Protocol to the Council of Europe Convention on Cybercrime on the Criminalisation of Acts of a Racist or Xenophobic Nature***

On December 17, 2001, the Council of Europe’s Committee of Experts on the Criminalisation of Acts of a Racist or Xenophobic Nature Committed through Computer Networks (“PC-RX”) began work on a protocol to the Council of Europe Convention on Cybercrime, discussed in Chapter 3.B.4., *supra*. At the initial meeting of the PC-RX, the U.S. delegation made available a December 13, 2001, letter to the Chairman of the PC-RX from Ralph F. Boyd, Jr., Assistant Attorney General, Civil Rights Division, and John C. Keeney, Acting Assistant Attorney General, Criminal Division, of the U.S. Department of Justice, excerpted below.

The full text of the letter is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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The United States deplores racism and xenophobia, and the violence and other harmful conduct that racist and xenophobic groups often seek to foster. The United States also supports dialogue

among internet users, providers, and others regarding racist and xenophobic content. However, . . . there are a number of factors—legal, as well as political, ethical, and technological—that would impose significant constraints on the implementation of any provision restricting racist and xenophobic content on the Internet. Foremost among these factors for the United States is our Constitution’s protection of freedom of speech and expression.

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## **2. Gender**

### ***a. Discrimination against women and girls in Afghanistan***

At the 45th session of the United Nations Commission on the Status of Women in March 2001, the United States again co-sponsored a resolution, Discrimination Against Women and Girls in Afghanistan, available at [www.un.org/womenwatch/daw/csw/e2001-27.pdf](http://www.un.org/womenwatch/daw/csw/e2001-27.pdf). (U.N. Doc. E/2001/27-E/CN.6/ 2001/14)

### ***b. Resolution on elimination of violence against women***

At the Fifty-seventh Session of the United Nations Commission on Human Rights, which was held at Geneva from March through April 2001, the United States provided explanations of its positions and votes on various resolutions of the Commission. The full text of the U.S. statements may be found at [www.humanrights-usa.net](http://www.humanrights-usa.net). The documents to which they relate are available at [www.unhchr.ch/html/menu2/2/57chr/57main.htm](http://www.unhchr.ch/html/menu2/2/57chr/57main.htm).

As to Resolution 2001/49, Elimination of Violence Against Women, Ambassador Shirin Tahir-Kheli explained the United States position as follows:

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My government is deeply committed to combating all forms of violence against women. In the past several years, our Congress has enacted legislation designed to address violence against women and to protect battered immigrant women. Both laws establish new options for women trapped in abusive relationships. We like-

wise remain fully engaged in international efforts to combat other forms of violence against women—including violence against civilian women in conflicted regions, and honor crimes.

However, in spite of strong United States support for the substance of this resolution, we maintain strong reservations to elements of the text, which prevent us from co-sponsoring. In particular, we object to the reference to the Convention on the Elimination of All Forms of Discrimination Against Women in Operative Paragraph 6. While it is certainly appropriate for the Commission to recommend international conventions to the consideration of member states, the Commission must recognize that signing and ratifying is ultimately a decision for domestic governments. . . .

Because of the U.S. commitment to the elimination of violence against women, we have made numerous attempts to negotiate revisions to this paragraph which would have allowed us to co-sponsor this resolution. We are disappointed that the failure of other delegations to accept such revisions has denied us this opportunity. Hence, Mr. Chairman, the United States regrets that it cannot co-sponsor the resolution. We nonetheless are pleased to join consensus.

***c. Women and land***

As to Resolution 2001/34, women's equal ownership of, access to and control over land, Ambassador George Moose provided the views of the United States, as follows:

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The United States regrets that it is forced to call for a vote on [Operative paragraph (“OP”)] 5. . . . Commission on the Status of Women Resolution 42-1—reaffirmed in this paragraph—includes no mention of the right to adequate housing.

Furthermore, the reference to the right of adequate housing is a misstatement of international human rights law. We have sought in negotiations before today to amend this resolution to make it consistent with the Universal Declaration of Human Rights, as well as with the Human Rights and Housing Resolution also being adopted under this agenda item. We strongly support,

moreover, the proposition that women's rights in the area of housing should be equal to those of men.

This, however, cannot be achieved through misstatement of accepted international principles or incorrect citations of resolutions adopted by other bodies. It is for these reasons that we are unable to co-sponsor this resolution.

### **3. Religion**

#### **a. *Annual Report on International Religious Freedom***

On October 26, 2001 the Department of State published the 2001 Annual Report on International Religious Freedom, which provides the views of the United States on religious freedom rights in other countries. The report, which is required by the International Religious Freedom Act of 1998, Pub. L. 105-292, 112 Stat. 2787, as amended, is available in full at [www.state.gov/g/drl/rls/irf/2001](http://www.state.gov/g/drl/rls/irf/2001).

#### **b. *Designation of countries of particular concern***

In conjunction with the Annual Report, the Secretary of State designated certain countries as "countries of particular concern" under the International Religious Freedom Act and identified the Taliban as a "particularly severe violator" of religious freedom. The excerpt below from the Daily Press Briefing of October 26, 2001 describes the Department's action.

The full text of the press briefing is available at [www.state.gov/r/pa/prs/dpb/2001/5764.htm](http://www.state.gov/r/pa/prs/dpb/2001/5764.htm).

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. . . [T]he Annual Report on International Religious Freedom is being made available on the State Department's website today. This is a report that covers the period from July 1st, 2000, to June 30th, 2001. . . . [Y]esterday, we submitted the report to Congress.

This year's report, again, like previous years, is a survey of the state of religious freedom throughout the world. It reemphasizes the strong commitment of the United States to respect and protect the fundamental freedom of religion, and we look forward to using this report as a basis of discussion and cooperation with other countries around the world on this very basic issue of human rights.

Make clear, we think there is no justification whatsoever for persecution of believers or discrimination against people because of their faith. And the President has made absolutely clear that we will not countenance in our country any form of discrimination, much less persecution against individuals or groups because of their religion.

The Secretary in conjunction with the issuance of this report has re-designated countries of particular concern in the International Religious Freedom Act. The countries that are re-designated are the following: Burma, China, Iran, Iraq and Sudan. He has also once again identified the Taliban regime as a particularly severe violator of religious freedom. They are not designated formally under the act because they are not a government. And finally, he has added the Democratic Republic of Korea . . . as a country of particular concern under the act.

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#### **4. Physical Disabilities**

The United States joined consensus in United Nations General Assembly Resolution 56/168 on November 30, 2001, calling for the establishment of an Ad Hoc Committee to consider proposals for a comprehensive and integral international convention to protect and promote the rights of persons with disabilities. Operative Paragraph 1 of the Resolution provides:

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The General Assembly

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1. Decides to establish an Ad Hoc Committee, open to the participation of all Member States and observers of the United Nations, to consider proposals for a comprehensive and integral



international convention to promote and protect the rights and dignity of persons with disabilities, based on the holistic approach in the work done in the fields of social development, human rights and non-discrimination and taking into account the recommendations of the Commission on Human Rights and the Commission for Social Development.

## C. CHILDREN

### 1. Resolution on Rights of the Child

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 25, 2001, Ambassador George Moose explained the United States position on Resolution 2001/75, Rights of the Child, as follows:

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I would like to begin by stressing the strength of my country's interest in and commitment to addressing the problems of children worldwide. This is reflected in the programs we have initiated and supported internationally and domestically to improve the lives of children. It can also be seen in our legal protections for children, which are among the strongest in the world.

Internationally, we have been strong supporters of many UN development agencies in their activities related to children. Domestically, our commitment to children can be seen in the emphasis President Bush has placed on education and ensuring that no child is left behind.

In joining consensus on this resolution, however, we must make a few reservations clear. First, while States may be encouraged to consider ratification of the Convention on the Rights of the Child, it is wrong to assert that there is an obligation to ratify it.

We also believe that it is inappropriate to use the Convention as a litmus test to measure a nation's commitment to children. As a non-party to the Convention, the United States does not accept obligations based on it, nor do we accept that it is the best or only standard for developing programs and policies that benefit children.

Finally, the references to a rights-based approach used in this resolution pose significant problems for the United States. While the Convention may be a positive tool in promoting child welfare for those countries that have adopted it, we do not support a rights-based approach that would create entitlements to economic, social, and cultural rights.

## **2. Optional Protocols to the Convention on the Rights of the Child**

On August 29, 2001, the Department of State wrote to the Senate Foreign Relations Committee stressing the urgency of Senate approval of the Optional Protocol on Involvement of Children in Armed Conflict and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, transmitted to the Senate July 25, 2000. (*See also Digest* 2000, Chapter 6.C.). Excerpts from the letter are set forth below.

The full text is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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[T]here are two treaties relating to child protection that urgently need Senate approval, and we did not want to lose any time in identifying them to you so that the Senate could move forward in scheduling hearings on these important treaties. These are:

- The Optional Protocol to the Convention on the Rights of the Child on Involvement of Children in Armed Conflict. Done at New York May 25, 2000 (Treaty Doc. 106-37); and
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography. Done at New York May 25, 2000 (Treaty Doc. 106-37).

Although styled as protocols to the Convention on the Rights of the Child, these two agreements are independent treaties and neither require nor have the effect of ratification of the Convention itself, nor imply any support for it. As you know, there is a United Nations General Assembly special session on children in New York in mid-September, and it would send a strong message about

the importance the U.S. assigns to these protocols—and the issues of child soldiers and other abuses of children—if hearings have been held before this date.

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### **3. Resolution on the Girl Child**

On November 1, 2001, in a meeting of the Third Committee, the United States explained its position on UN General Assembly Third Committee Resolution 56/139, *The Girl Child*, as follows:

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The US will join consensus on this resolution as an expression of its support for the promotion and protection of the human rights of the girl child. Particularly in Afghanistan, the world watched over the past several years with deep dismay how a regime trampled roughshod over the human rights of its population, denying children the opportunity to be children. It is vital, especially at this time, that the international community speak with one voice in support of the rights of the girl child.

However, the US must express its strong opposition to the substance of certain provisions included in this resolution. With regard to [Operative Paragraph 1, referring to the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women], the United States is not a party to either of the conventions identified, and therefore, cannot agree that there is a need for universal ratification of those conventions. As the US has not accepted any legal obligations under those agreements, it has no obligation to implement any of their provisions. The primary responsibility for the promotion and protection of the human rights of the girl child lies with Member States.

## **D. DEVELOPMENT**

### **1. Resolution on Right to Development**

a. On March 27, 2001, at the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra*

in 6.B.2.b., Ambassador George Moose provided the views of the United States on Item 7, The Right to Development:

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. . . [T]he U.S. commitment to economic growth and international development is long-standing and sincere. I know that development is one of the keys to a stable, secure and prosperous world. And I know that helping nations achieve sustainable economic growth is a major goal of our foreign policy.

Over the years, we have learned what are some of the obstacles to sustainable development. While I don't pretend to have all the answers, I think we can agree on the following:

First, the protection of basic civil and political rights is indispensable to sustainable growth. This all-important link between human rights and economic development is sometimes missing from the discussions on Item 7 here at the Commission on Human Rights. Some governments see no connection between civil society, political freedom, and national development. We do.

Second, a government that seeks growth and development without respecting these core rights is unlikely to succeed for very long. Development cannot precede human rights; it can only proceed in harmony with human rights.

Third, individual liberty unlocks the creative and entrepreneurial spirit. Protection of private property and the freedom to contract give individuals the confidence to invent, innovate, and invest. Without confidence in the laws that govern them, people simply will not devote their energy and genius in any system. Any government that hopes to achieve sustainable, long-term growth, therefore, must nurture the atmosphere in which individual talents can flourish.

Finally, we know that government-controlled economies never seem to work over the long-term. There is no substitute for free markets, transparent financial institutions, and respect for the rule of law. This is why our assistance programs increasingly focus on promoting democracy, good governance, fighting corruption, and developing a free and independent media. These are all vital components of civil society, and any development strategy that ignores them runs a strong risk of failure.

Abraham Lincoln understood the linkage between free markets and free men. Nearly 150 years ago, he said: "You cannot strengthen the weak by weakening the strong. You cannot help the wage earner by pulling down the wage payer. You cannot further the brotherhood of man by encouraging class hatred. You cannot build character and courage by taking away a man's initiative and independence. You cannot help men permanently by doing for them what they could and should do for themselves."

It was in this spirit that our delegation participated in the Working Group on the Right to Development. It is important to seek common ground where we can, and to air our differences when we cannot. We actively participated in the Working Group in hopes of building a consensus around fundamental prerequisites of development.

We value the contributions made by members of the Working Group, which we believe have helped to advance our discussions. It is clear, however, that significant differences remain among the participants in this important debate and that we still have a considerable distance to go before it can be said that a genuine consensus exists regarding the definition of the right to development. We regret that the Report of the Chairman of the Working Group fails to capture the richness and diversity of our exchanges. It does not, for example, reflect the real differences expressed regarding the Independent Expert's proposal concerning a so-called "development compact."

We were especially disappointed to note the absence of any reference to the importance of good governance, democracy and the rule of law, and the protection of basic human rights from the Chair's closing observations. It was less than a year ago, right here in Geneva, at the five-year review of the Copenhagen Social Summit, that member states reaffirmed their understanding of the centrality of these concepts to the process of human development.

\* \* \* \*

[The U.S.] will continue to subscribe fully to the principles affirmed in the Vienna Declaration regarding the obligation of states to cooperate with each other in ensuring development. In particular, we will do all that we can to support and assist those who understand that, again in the words of the Vienna Declaration, "the human person is central subject of development," and

who recognize that the highest responsibility of governments is to promote the conditions that are most likely to enable every member of society to realize his or her full potential.

\* \* \* \*

b. On April 18, 2001, at the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., Ambassador George Moose explained the United States vote on Resolution 2001/9, Right to Development, as follows:

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\* \* \* \*

At the opening of the session of the Working Group on the Right to Development last September, there were hopes for cooperation and progress on this issue, after a decade of contentious disagreements. The decision of the sponsors of the Right to Development resolution at the 2000 U.N. General Assembly to adopt a procedural resolution for the first time reinforced the seriousness of the dialogue. The inclusion of experts from the international financial institutions in the discussions of the Working Group was a positive development.

However, by the end of the second session of the Working Group, it was clear that there was no consensus as to its conclusions, as proposed by the Working Group Chair. Among the concerns the United States expressed were the need for a more concrete definition of the Right to Development, the need to focus more on the national aspects of RTD, and the questionable utility of asking the Independent Expert to compile a study of international economic issues.

Mr. Chairman, the resolution before us . . . includes many of the same conclusions that resulted in the Working Group's failure to achieve consensus. We have serious reservations about these conclusions and would have preferred that the resolution's sponsors defer discussion of these issues until future sessions of the Working Group. For these reasons, we deeply regret we have no choice but to vote no on this resolution.

## 2. Resolution on Economic, Social and Cultural Rights

At the Fifty-seventh Session of the United Nations Commission on Human Rights, on April 20, 2001, noted *supra* in 6.B.2.b., Ambassador George Moose explained the United States position on Resolution 2001/30, Question of the Realization in all Countries of the Economic, Social and Cultural Rights Contained in the Universal Declaration of Human Rights and in the International Covenant on Economic, Social and Cultural Rights, and Study of Special Problems which the Developing Countries Face in their Efforts to Achieve these Human Rights, as follows:

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\* \* \* \*

We are pleased to be able to join consensus on this important resolution on economic, social and cultural rights. We must oppose, however, to the proposal in [Operative Paragraph (“OP”)] 8(c) for the creation of an independent expert to examine the question of a draft optional protocol to the International Convention on Economic, Social and Cultural Rights concerning the establishment of an individual complaints mechanism for economic, social, and cultural rights.

We are concerned that OP8(c) leads in the direction of the creation of legal, enforceable entitlements to economic, social and cultural rights. This would mean, *inter alia*, that states must have effective judicial or administrative remedies at the national level. In other words, citizens could sue their governments for enforcement of rights. It is our considered view that such rights are intended to be progressively realized, and are not rights which create immediate, actionable entitlements of a citizen vis-a-vis his or her own government.

It is for this reason that we feel obliged to call for a vote and vote no on OP8(c).

## 3. Resolution on Adequate Housing

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 20,

2001, Ambassador George Moose explained the United States position on 2001/28, Adequate Housing as a Component of the Right to an Adequate Standard of Living, as follows:

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\* \* \* \*

The United States is pleased to support this resolution on Adequate Housing as a Component of the Right to an Adequate Standard of Living. . . .

However, in doing so, we must also register our concern with the initial work of the Special Rapporteur. In our view, his comments go far beyond the mandate established for him by this Commission. They seek to redefine the concept of adequate housing and propose work that is encompassed in the mandates of other Special Rapporteurs and U.N. Agencies.

#### **4. Resolution on Right to Food**

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 20, 2001, Ambassador George Moose explained the United States vote on Resolution 2001/25, The Right to Food, as follows:

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\* \* \* \*

. . . The United States government believes that the best route to food security is through the adoption of sound policies that expand food production, encourage growth, and open markets. While the international community clearly has an important role to play, the primary responsibility for addressing food security and hunger rests with each country's government.

The United States plays a major role in promoting food security around the world. We offer substantial food assistance both bilaterally and multilaterally. The United States is also the largest food donor in the world, helping those still threatened by hunger.

The United States cannot support L.12. We regret that we have been obliged to call for a vote in order to vote against this text.



The sponsors have decided to base this resolution on General Comment 12, released in May 1999 by the Committee on Economic, Social and Cultural Rights. This Comment is “welcomed” by the resolution, and purportedly sets forth the “authoritative definition on the right to food.” We disagree with this definition, as well as with the presumption that any agreement exists, in this body or any other, on such a definition.

This Comment contains many assertions that the United States cannot support. It implies that citizens of a State have a human right to receive food directly from the government of that State, and it also suggests a legal remedy at the national and international levels against a State for those individuals who believe their presumed right has been denied.

As we cannot support the views expressed in Comment 12, we cannot support this resolution. . . .

## **5. Resolution on Access to Medication**

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 23, 2001, Ambassador George Moose explained the United States vote on Resolution 2001/33, Access to Medication in the Context of Pandemics such as HIV/AIDS, as follows:

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\* \* \* \*

The United States is strongly committed to addressing the AIDS pandemic internationally, including access to treatment and care. . . . We very much regret, however, that, despite extensive dialogue regarding this very complex issue, we are unable to join consensus on this text.

From the perspective of good public health practice, we believe that this resolution is flawed in a number of ways. As written the resolution would limit the rights of States to set priorities within their national policies and strategies for dealing with such pandemics. We believe that States must have the latitude to develop balanced strategies that include prevention, counseling and related support services, as well as care, including access to drugs.

We note that UNAIDS—the UN’s umbrella organization for

responding to the HIV/AIDS crisis—was established to de-medicalize HIV/AIDS and to focus on the need for a multi-dimensional approach to this pandemic. It is clear that an over-emphasis on use of pharmaceuticals, no matter how well intentioned, detracts from the more fundamental need for primary prevention.

HIV/AIDS is a horrible disease. Once started, medicines must be used consistently day after day after day for the rest of a patient's life. If stopped, when the patient feels better, the disease returns very strongly. Therefore, for treatment to be effective, it is essential that states put in place the infrastructure to ensure that anti-retrovirals are used appropriately.

The resolution calls into question the legitimate responsibility of national governments to assure the effectiveness and safety of pharmaceutical products for agreed protections of intellectual property rights. In so doing, it could well have the unintended consequence of discouraging investment in the important research desperately needed to find the cures of the future. Nor does this resolution consider the potential for other unintended consequences, including the emergence of more vigorous and drug resistant forms of the HIV virus. Simply put, this is bad public health policy.

This resolution is, in essence, a flawed health document, not a human rights document. Complex health matters are best dealt with by the UN organization that has the technical competence in those matters—the World Health Organization. The 191 member states that comprise the World Health Assembly will be meeting here in Geneva in three weeks time, and both HIV/AIDS and WHO's Revised Drug Strategy will be on the agenda. That is the most appropriate venue for health matters.

My government is also concerned by references which appear to be aimed at creating a new category of rights, such as the reference to the right to the "highest attainable standard of physical and mental health." The United States does not support the creation of legally enforceable entitlements or the establishment of judicial or administrative remedies at the national or international levels to adjudicate such presumed rights.

The U.S. Government is the world's leading provider of international assistance for the purpose of providing that people living with HIV/AIDS receive treatment and care, including

pharmaceuticals. We have played a leading role in the development of international strategies to combat the scourge of this disease. We cannot, however, support a flawed resolution whose unintended consequences could prove extremely harmful to our collective efforts. . . .

## E. MEDICAL AND HEALTH

### Abortion-related Activities ("Mexico City Policy")

On July 31, 2001, the Southern District of New York dismissed a claim against United States officials for lack of standing. *Center for Reproductive Law & Policy v. Bush*, No. 01-Civ-4986 (LAP), 2001 U.S. Dist. LEXIS 10903. Plaintiffs sued to bar enforcement of the "Mexico City Policy," previously in effect under Presidents Ronald Reagan and George H.W. Bush and restored by President George W. Bush in 2001. The Mexico City Policy and the "Standard Clause" required to implement it, place certain limitations on the availability of federal U.S. foreign assistance funds for population planning. Plaintiffs asserted that these limitations violate their First Amendment rights of free speech and association and of peaceable assembly and their Fifth Amendment right of equal protection, as well as international law. In dismissing the claim for lack of standing, the court explained:

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Here a U.S.-based advocacy organization and several of its staff members complain that they are injured by certain restrictions on U.S. aid to foreign nongovernmental organizations passed by Congress or initiated by the President. They argue that the restrictions caused those foreign organizations to refrain from assisting plaintiffs, thus impairing plaintiffs in their advocacy activities, both here and abroad. Because the injuries plaintiffs complain of 1) are not concrete and imminent but are conjectural, and 2) are not caused by the conduct they challenge but instead by the foreign organizations' independent decision to accept U.S. aid money with its attendant restrictions (rather than assist plaintiffs with their advocacy activities), plaintiffs have not met their bur-

den of demonstrating standing under Article III of the Constitution. 2001 U.S. Dist. LEXIS 10903, at \* 3.

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Excerpts below from the United States Motion to Dismiss the Complaint for Failure to State a Claim and for Lack of Subject Matter Jurisdiction, filed June 29, 2001, provide the views of the United States on the merits of the claims as they relate to foreign policy and international law. Internal citations to the complaint have been deleted.

The full text of the brief is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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### **Preliminary Statement**

On January 22, 2001, President George W. Bush announced the restoration of the “Mexico City Policy” (the “Policy”), which concerns federal foreign assistance for family planning. Such assistance is typically provided to foreign governments, multilateral organizations, and nongovernmental organizations (“NGOs”); the last category comprises domestic NGOs (“DNGOs”) and foreign NGOs (“FNGOs”). The Policy provides that, as a condition of receiving USAID assistance for family planning, an FNGO is prohibited during the term of the assistance from using its own funds to perform or actively promote abortion as a method of family planning abroad. By contrast, a DNGO that receives USAID assistance for family planning is not prohibited from using its own funds to perform or actively promote abortion as a method of family planning domestically or abroad. A DNGO must agree only that it will not enter into subagreements with FNGOs that perform or actively promote abortion as a method of family planning abroad. The Policy does not apply to USAID assistance for family planning to foreign governments or multilateral organizations.

The Policy was originally announced by the Reagan administration in 1984 at the United Nations International Conference on Population in Mexico City. The Policy continued in force under the prior Bush administration. Although President Clinton rescinded it in 1993, President Bush formally restored it on March 28, 2001, when he issued a memorandum entitled “Restoration

of the Mexico City Policy.” 66 Fed. Reg. 17,303 (2001).<sup>1</sup> The memorandum directed the USAID administrator to implement the Policy by including certain language (the “Standard Clause”) in grants, cooperative agreements, and grants under contracts (collectively, “assistance agreements”). *See id.*

Under the Reagan and prior Bush administrations, three lawsuits were filed—one in this Court, and two in the District of Columbia—challenging the Policy and Standard Clause on constitutional and statutory grounds. The challenges were ultimately rejected in each case, with the Second and D.C. Circuits issuing thorough opinions.<sup>2</sup>

\* \* \* \*

## THE FIRST AMENDMENT AND EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED

*PPFA IV* requires dismissal of the First Amendment claims in this case. Those claims are based on the premise that the Standard Clause essentially buys off Plaintiffs’ “potential partner organizations” from associating with Plaintiffs. However, Plaintiffs do not dispute that the Policy and Standard Clause, as restored in 2001, are the same for all relevant purposes as they were when upheld

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<sup>1</sup> On January 22, 2001, President Bush issued a Memorandum to the Administrator of USAID, directing him to restore the Policy. The Policy was initially implemented through USAID’s Contract Information Bulletin 01–03 that was issued on February 15, 2001. CIB 01–03 was cancelled on March 23, 2001, by instruction of President Bush, who issued the memorandum entitled “Restoration of the Mexico City Policy” on March 28, 2001.

<sup>2</sup> The case filed in this Court generated four opinions: *Planned Parenthood Fed’n of Am. v. AID*, 670 F. Supp. 538 (S.D.N.Y. 1987) (“*PPFA I*”); *Planned Parenthood Fed’n of Am. v. AID*, 838 F.2d 649 (2d Cir. 1988) (“*PPFA II*”); *Planned Parenthood Fed’n of Am. v. AID*, 1990 WL 26306 (S.D.N.Y. Mar. 7 1990) (“*PPFA III*”); and *Planned Parenthood Fed’n of Am. v. AID*, 915 F.2d 59 (2d Cir. 1990) (“*PPFA IV*”). The first case filed in the District of Columbia also generated four opinions: *DKT Memorial Fund v. AID*, 630 F. Supp. 238 (D.D.C. 1986) (“*DKT I*”); *DKT Memorial Fund v. AID*, 810 F.2d 1236 (D.C. Cir. 1987) (“*DKT II*”); *DKT Memorial Fund v. AID*, 691 F. Supp. 394 (D.D.C. 1988) (“*DKT III*”); and *DKT Memorial Fund v. AID*, 887 F.2d 275 (D.C. Cir. 1989) (“*DKT IV*”). The remaining case generated one opinion: *Pathfinder Fund v. AID*, 746 F. Supp. 192 (D.D.C. 1990) (“*Pathfinder*”).

in *PPFA IV*. Moreover, Plaintiffs' First Amendment claims here are essentially the same as those rejected in *PPFA*, where the plaintiffs, like Plaintiffs here, alleged violation of the rights to speak, associate, educate, advocate, lobby, seek law reform, and provide and receive information. In short, the questions raised by the Complaint were "asked and answered" in *PPFA IV*: The Standard Clause violates none of Plaintiffs' First Amendment rights.

In *PPFA IV*, as here, the plaintiffs asserted that their First Amendment rights were infringed by the requirement, applied to FNGOs, to certify that they do not perform or actively promote abortion. The plaintiffs there, as here, claimed that the Standard Clause's certification requirement effected a "buying off" of those rights. *See PPFA IV*, 915 F.2d at 63. Under numerous precedents upholding government's power to deny subsidies, the Second Circuit held that, while perhaps incidentally limiting the plaintiffs' ability to associate with FNGOs, the Standard Clause still leaves DNGOs free to use their own funds to engage in every kind of First Amendment activity that they wish. This freedom demonstrated to the Circuit's satisfaction that there was no infringement of any right. So, here, Plaintiffs are free to use their own private funds.

As the Circuit held, the First Amendment does not compel the Government to subsidize or facilitate the exercise of a right—in Plaintiffs' language, to "maximize the effectiveness of [their] speech." Here, in essence, Plaintiffs are asking the Court to maximize the effectiveness of their First Amendment rights by undoing the Government's exercise of its own power to grant or deny a subsidy—an exercise already sustained by the Second Circuit in *PPFA IV*, where the plaintiffs challenged the same Policy and Standard Clause. . . .

\* \* \* \*

### **The Second Circuit's Subsidy Analysis, Informed by Foreign Policy Concerns, Is Dispositive**

The Second Circuit began its analysis with a bedrock principle of First Amendment law: "The government's 'decision not to subsidize the exercise of a fundamental right does not infringe the right. . . .'" *PPFA IV*, 915 F.2d at 63 (quoting *Regan v. Taxation With Representation* ("TWR"), 461 U.S. 540, 549 (1983)). The

Circuit then cited a number of Supreme Court holdings applying this principle. . . .

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In all of the precedents cited, the Circuit observed, the government conduct at issue was upheld because “the mere refusal to subsidize a fundamental right ‘places no governmental obstacle in the path’ of a plaintiff seeking to exercise that right.” *PPFA IV*, 915 F.2d at 63 (quoting *Harris v. McRae*, 448 U.S. 297, 315 (1980) (government may decide to fund medical expenses incident to childbirth, but not expenses related to abortion)).

In view of this voluminous authority, the Second Circuit in *PPFA* had little difficulty rejecting the plaintiffs’ “buying off” claim:

[T]he Standard Clause does not prohibit plaintiffs-appellants from exercising their first amendment rights. *Plaintiffs-appellants may use their own funds to pursue whatever abortion-related activities they wish in foreign countries.* Indeed, the Standard Clause permits Planned Parenthood to grant AID funds to a foreign NGO for all aspects of family planning except abortion and to use its own funds to establish an abortion-related facility next door. *The harm alleged in the complaint is the result of choices made by foreign NGOs to take AID’s money rather than engage in non-AID funded cooperative efforts with plaintiffs-appellants.*

*PPFA IV*, 915 F.2d at 64 (emphases added).<sup>13</sup> Thus, a basis for the *PPFA IV* holding, as for all of its underlying precedents, was causation. Because the constitutional harms alleged were not caused by the Government but rather by the financial needs and private choices of others—here, of FNGOs—the plaintiffs’ “buying off” claim failed on the merits.<sup>14</sup>

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<sup>13</sup> When it similarly rejected the plaintiff DNGO’s association claims on the merits, the *DKT IV* court further found no constitutional right of organizations to associate together. *Id.* at 292, 294–95.

<sup>14</sup> In rejecting constitutional challenges to funding decisions, the subsidy precedents repeatedly cite the plaintiff’s failure to establish that gov-

The Circuit further held in *PPFA IV* that a judgment for the plaintiffs would have intolerable consequences for American foreign policy, as well as the separation of powers:

Were the courts to allow challenges to foreign aid programs on the ground that the government's subsidy of a particular viewpoint abroad encourages the foreign recipients of American aid not to speak or associate with Americans opposed to that viewpoint, the political branches would find it impossible to conduct foreign policy. A holding in favor of plaintiffs-appellants in this case would open the possibility of attacks by white supremacists on the policy of the United States with respect to ending apartheid, *see* 22 U.S.C. §§ 5001–5117, a policy that involves not merely financial incentives for a particular viewpoint but coercive sanctions, *see, e.g.*, 22 U.S.C. § 5081. Opponents of American foreign policy pertaining to international terrorism could contest restrictions on aid to “entities associated with” the Palestine Liberation Organization, *see* 22 U.S.C. § 2227. Plaintiffs-appellants have not proposed any means of distinguishing between the Mexico City Statement and these other policies directed at non-

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ernment, rather than need or private choice, caused the harm alleged. *See, e.g., Webster v. Reproductive Health Servs.*, 492 U.S. 490, 509 (1989) (“The challenged provisions only restrict a woman’s ability to obtain an abortion to the extent that she chooses to use a physician affiliated with a public hospital. This circumstance is more easily remedied, and thus considerably less burdensome, than indigency, which ‘may make it difficult—and in some cases, perhaps, impossible—for some women to have abortions’ without public funding.” (quoting *Maheer*, 432 U.S. at 474)); *McRae*, 448 U.S. at 316 (“The financial constraints that restrict an indigent woman’s ability to enjoy the full range of constitutionally protected freedom of choice are the product not of governmental restrictions on access to abortions, but rather of her indigency.”); *Maheer*, 432 U.S. at 474 (quoted *supra*); *Buckley v. Valeo*, 424 U.S. 1, 94–95 (1976) (“[The law] does not prevent any candidate from getting on the ballot or any voter from casting a vote for the candidate of his choice; the inability, if any, of minor-party candidates to wage effective campaigns will derive not from lack of public funding but from their inability to raise private contributions.”). The D.C. Circuit court reached the same result when it rejected all of the *DKT* plaintiffs’ free speech claims, *see DKT IV*, 887 F.2d at 286–90, and association claims, *see id.* at 293.



citizens that have an incidental impact on the first amendment rights of citizens.

*PPFA IV*, 915 F.2d at 64–65. In *DKT IV*, 887 F.2d at 289–90, the D.C. Circuit made a similar holding: “It is unthinkable that in order to make [the Government’s] encouragement [of the anti-apartheid viewpoint in South Africa] constitutional, the government would likewise have to underwrite efforts to encourage the continuance of the abhorrent and morally repugnant system of apartheid.” *Id.* at 290; *see also id.* (“Hardly anyone would assert that this title[, permitting federal grants to Radio Free Europe and Radio Liberty for the promotion of the rights of freedom of opinion and expression, *see* 22 U.S.C. § 2871,] is unconstitutional unless it also requires the United States to make grants opposing the rights set forth in section 2871.”).

This foreign-policy rationale reflects respect, under the separation-of-powers doctrine, for the President’s plenary power to set the nation’s foreign policy: “The President is the sole organ of the nation in its external relations. . . .” *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 318–19 (1936). As a corollary of this plenary authority, nonresident aliens (including FNGOs) who are beyond the borders of the United States and not within the custody or control of the United States lack rights under the U.S. Constitution. *See DKT IV*, 887 F.2d at 284–85. Pursuant to his plenary authority, the President may disassociate the United States completely from foreign organizations because of their viewpoints or activities. Thus, in *PPFA*, where the plaintiffs challenged the President’s exercise of this foreign-policy authority in his issuance of the Policy, the Second Circuit held that “the wisdom of, and motivation behind, th[e P]olicy are not justiciable issues.” *PPFA IV*, 915 F.2d at 64.

The *DKT IV* court reached the same conclusion: “To hold that the United States government cannot make viewpoint-based choices in foreign affairs would be unthinkable. As the Supreme Court has frequently reminded us, ‘many [foreign affairs] questions uniquely demand single-voiced statement of the Government’s views.’” *DKT IV*, 887 F.2d at 289–90 (quoting *Baker v. Carr*, 369 U.S. 186 (1962)). For these reasons, the *DKT IV* court explained that, although the Policy permits foreign governments (but not FNGOs) to use non-USAID funds for abortion-related

activity without jeopardizing their USAID eligibility, this fact is simply a “recognition of the sovereignty and self-determination” of other countries and does not compel the Government to associate with FNGOs whose conduct conflicts with American foreign policy. *DKT IV*, 887 F.2d at 291.

In sum, Plaintiffs, like their predecessors in *PPFA*, are simply challenging the Government’s “decision not to subsidize”—indirectly, in the form of unqualified USAID funding of FNGOs—“the exercise of a fundamental right.” *PPFA IV*, 915 F.2d at 63. Thus, Plaintiffs’ First Amendment claims should be dismissed under *PPFA IV* because their claims are indistinguishable from those rejected in that case.

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### PLAINTIFFS’ INTERNATIONAL LAW CLAIMS SHOULD BE DISMISSED

Plaintiffs base some of their claims on treaties that the United States has ratified, namely, the Charter of the United Nations, U.N. Charter, 59 Stat. 1037 (1945), and the International Covenant on Civil and Political Rights, Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171 (December 19, 1966). These treaties, however, are not “self-executing.” That is, they do not grant Plaintiffs any private right of action and may not be relied upon by individuals. *Igartua de la Rosa v. United States*, 32 F.3d 8, 10 n.1 (1st Cir. 1994), *cert. denied*, 514 U.S. 1049 (1995); *Committee of Citizens v. Reagan*, 859 F.2d 929, 937–38 (D.C. Cir. 1988); *Frolova v. United States*, 761 F.2d 370, 373–75 (7th Cir. 1985); *Dreyfus v. von Finck*, 534 F.2d 24, 30 (2d Cir. 1976). In particular, the Senate and the Executive Branch agreed at the time of ratification that the Covenant articles on which Plaintiffs rely are not self-executing and may not be relied upon by individuals. S. Exec. Rep. No. 23 102d Cong., 2d Sess. 9, 19, 23 (1992); 138 Cong. Rec. 8068, 8070–71 (April 2, 1992). Where the political branches have explicitly agreed to preclude an individual remedy under these provisions, it would be particularly anomalous for the Court to recognize one. *Cf. Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir.) (political branches should have “wide latitude” in judgments “bound up with foreign policy considerations”), *cert. denied*, 121 S. Ct. 1130 (2000).

Plaintiffs further base their claims on the Universal Declaration of Human Rights, G.A. Res. 218A, U.N. GAOR, 3d Sess. pt. 1, 67th Plea. Mtg., U.N. Doc. A/810 (1948), and the American Declaration of the Rights and Duties of Man, signed May 2, 1948, OAS Off. Rec. OEA/Ser.L/V/II.23 doc. 21, rev.6 (English 1979). These two Declarations are neither treaties nor binding international agreements. Indeed, at the time of adoption of the Universal Declaration of Human Rights by the United Nations General Assembly, Eleanor Roosevelt, Chairman of the U.N. Human Rights Commission, who was instrumental in its adoption, stated that the Universal Declaration “is a declaration of basic principles” but “is not and does not purport to be a statement of law or legal obligation.” 5 M. Whiteman, *Digest of International Law* (1965), at 243; *see also Haitian Refugee Ctr v. Gracey*, 600 F. Supp. 1396, 1405–06 (D.D.C. 1985) (quoting Whiteman and holding that Universal Declaration of Human Rights “is merely a nonbinding resolution, not a treaty,” and “provides no right of action for the plaintiffs”), *aff’d*, 809 F.2d 794 (D.C. Cir. 1987); *Carpa v. Smith*, No. Civ. 96-1435 PHX EHC, 1998 WL 723153, at \*6 (D. Ariz. July 20, 1998) (same); *In re Alien Children Educ. Litigation*, 501 F. Supp. 544, 593 (S.D. Tex. 1980) (same); *Garza v. Lappin*,—F.3d—, 2001 WL 669769, at \*4 (7th Cir. June 14, 2001) (“the American Declaration of the Rights and Duties of Man . . . is merely an aspirational document that, in itself, creates no directly enforceable rights”); *Jamison v. Collins*, 100 F. Supp. 2d 647, 767 (S.D. Ohio 2000) (same).

Plaintiffs, while relying on customary international law, fail to specify the precise customary rule that supports their claim. To the extent that Plaintiffs assert a customary rule protecting the rights of speech and association, Plaintiffs’ claim should be dismissed for several reasons. Briefly stated, customary international law is “international law result[ing] from a general and consistent practice of states followed by them from a sense of legal obligation.” Restatement (Third) of Foreign Relations Law (1987) § 102(2); *see, e.g., Jamison*, 100 F. Supp. 2d at 767 (“because about 90 countries across the globe still retain the death penalty, no customary international law yet exists to support the prohibition of the death penalty”). The critical factor here is states’ *practice*, not their declarations. Additionally, “a practice that is generally followed but which states feel free to disregard does not contribute

to customary law.” *Id.*, cmt c. Above all, U.S. courts resort to customary international law if “there is no treaty and no controlling executive or legislative act or judicial decision.” *The Paquete Habana*, 175 U.S. 677, 700 (1900).

In the first place, Plaintiffs’ customary international law claim fails because, insofar as they allege any customary rule at all, it is based on states’ declarations, not on states’ practice. Even assuming that the Covenant represents practice, rather than mere declaration, there are “controlling executive [and] legislative act[s],” *id.*, that bar Plaintiffs’ claim—namely, the Senate’s Resolution of Ratification of the Covenant, which resolution adopted, *inter alia*, the President’s proposed reservation concerning free speech. See S. Exec. Rep. No. 23 102d Cong., 2d Sess. 6–7, 21–22 (1992). That reservation, jointly expressed by the President and the Senate, states that the Covenant is *more* restrictive of free speech rights than is the First Amendment and that the United States will accordingly adhere to the First Amendment. *Id.* at 21–22. Thus, either Plaintiffs’ lack the customary law rights that they claim, or those rights are certainly no greater than the rights protected by the First Amendment. In the latter case, Plaintiffs’ claim should be dismissed for the reasons stated *supra* in Point I: The Standard Clause leaves Plaintiffs free to speak and associate as they wish and with whomever they wish. Moreover, nothing in customary international law requires a nation to subsidize speech or association, or fund foreign groups whose views and conduct are contrary to the foreign policy of that nation.

To the extent that Plaintiffs assert a customary rule protecting abortion-related rights, the Complaint itself establishes that customary international law does not bar laws that prohibit or restrict abortion. Far from the “general and consistent practice of states,” what Plaintiffs allege is simply a program of private advocacy by themselves and others. Specifically, Plaintiffs allege that they “engage in political speech and advocacy designed to promote abortion as an international human right.” They state that they “[have] worked and will continue to work to guarantee that the right to abortion [is] protected as an internationally recognized human right by . . . customary international law.” Plaintiffs also assert that their “mission . . . will not be complete until abortion laws here and abroad have been reformed. . . .” The essence of these allegations is that states do not generally fol-

low the rules that Plaintiffs advocate. Thus, Plaintiffs fail to state a claim under customary international law.

Plaintiffs further rely on documents adopted at three conferences: the Cairo International Conference on Population and Development, September 1994, the Beijing Fourth World Conference on Women, September 1995, and the Vienna World Conference on Human Rights, June 1993. These documents, however, are non-binding political statements and do not themselves demonstrate the “general and consistent practice of states.” Restatement (Third) of Foreign Relations Law (1987) § 102(2).

Finally, Plaintiffs rely on section 502B(a)(1) of the FAA, 22 U.S.C. § 2304(a)(1), and section 302 of the United States International Broadcasting Act of 1994, 22 U.S.C. § 6201. Both provisions, however, are self-evidently statements of policy and do not give Plaintiffs enforceable rights. *See* 22 U.S.C. § 6201 (stating “policy” of United States); 22 U.S.C. § 2304(a)(1) (describing “principal goal of the foreign policy of the United States”); *cf. Clark v. United States*, 609 F. Supp. 1249, 1251 (D. Md. 1985) (barring private suit under 22 U.S.C. § 2304 (a)(2)).

Accordingly, Plaintiffs’ international law claims should be dismissed.

\* \* \* \*

## F. TORTURE

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 25, 2001, Steven Solomon of the U.S. Delegation, explained the United States position on Resolution 2001/62, Torture and other Cruel, Inhumane or Degrading Treatment or Punishment, as follows:

\* \* \* \*

With respect to [Operative Paragraph (“OP”)8, calling on Governments to take “appropriate effective legislative, administrative, judicial or other measures to prevent and prohibit the production, trade, export and use of equipment which is specifically designed to inflict torture or other cruel, inhuman or

degrading treatment”], while we strongly support measures aimed at preventing torture and the use of torture devices, the United States cannot support overbroad and vague calls for legislative and other measures dealing with issues of production, as in OP8, where it is obvious that significant definitional and scope problems exist.

With respect to OP27, the government of the United States would like to restate its belief that while visits by special rapporteurs should be welcomed, it is inappropriate to single out individual countries for criticism in thematic resolutions. . . .

## **G. JUDICIAL PROCEDURE, PENALTIES AND RELATED ISSUES**

### **1. Capital Punishment**

#### ***a. Evidence considered in sentencing***

##### ***(1) Inter-American Commission on Human Rights Final Report***

Juan Raul Garza was convicted in the U.S. District Court for the Southern District of Texas of five violations of federal drug trafficking laws, operating a continuing criminal enterprise, money laundering, and three counts of killing in furtherance of a continuing criminal enterprise. At a later punishment hearing, the government introduced evidence showing that he had committed four additional murders in Mexico. The jury recommended a sentence of death. This conviction and sentence were affirmed on appeal. *United States v. Flores*, 63 F.3d 1342 (5th Cir. 1995); rehearing denied, *United States v. Garza* 77 F.3d 481 (5th Cir. 1995), *cert. denied*, *Garza v. United States*, 519 U.S. 825 (1996).

On January 27, 2000, Garza lodged a petition with the Inter-American Commission on Human Rights, Case No. 12.243, alleging violations of the American Declaration of the Rights and Duties of Man, in particular Article 1 (death penalty violates right to life), Article 18 (right to a fair trial) and Article 26 (right to due process of law). (*See also Digest* 2000, Chapter 6.G.1.)

On April 4, 2001, the Inter-American Commission on Human Rights published its Final Decision on the petition of Juan Raul Garza. The Commission concluded that the imposition of the death penalty by the United States in that case violated Articles I, XVIII and XXVI of the American Declaration on the Rights and Duties of Man because of the introduction of evidence concerning the alleged murders in Mexico for which Mr. Garza had not been tried in any court. The Commission also made certain recommendations to the United States, discussed below. Report No. 52/01, Case No. 12.243. The report of the Commission is available at [www.iachr.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm](http://www.iachr.org/annualrep/2000eng/ChapterIII/Merits/USA12.243.htm).

The Commission notified the United States by note dated April 9, 2001, that it planned to publish its Final Report and reiterated its recommendations to the United States. On June 14, 2001, the Commission requested information from the United States regarding the measures taken to implement the Commission's recommendations regarding Garza, specifically, "that the United States provide Mr. Garza with an effective remedy that includes commutation of sentence . . . [and] that the United States review its laws, procedures and practices to ensure that persons who are accused of capital crimes are tried and if convicted, sentenced in accordance with the rights established in the American Declaration . . . and in particular by prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials." The letter noted that Mr. Garza's execution was scheduled for June 19, 2001, and "requested pursuant to Article 2(1) of the Commission's Rules of Procedure that the United States stay Mr. Garza's execution pending implementation of the Commission's recommendations." The United States responded on June 15, 2001, as set forth below.

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The Government of the United States has considered the Commission's letter of June 14, 2001 concerning the case of Juan Raul Garza. The letter restates the conclusions reached by the Commission in Report 52/01 contained in its annual report dated April 18, 2001.

We do not agree with the Commission's conclusions. For reasons stated in our previous arguments before the Commission, the petitioner failed to establish, among other things: that his rights under the American Declaration were violated; that international law precludes the use of the death penalty; or that there was a violation of either the right to a fair trial or the right to due process of law in relation to his criminal proceeding. It has been our consistent view that the petition is manifestly groundless.

With regard to the Commission's request for precautionary measures, we reiterate that the Commission's authority to issue such measures does not exist in the American Convention on Human Rights or in the IACHR statute. Accordingly, we consider this request a non-binding recommendation.

*(2) Related domestic litigation*

Mr. Garza's efforts to have his execution stayed and his sentence commuted on the basis of the Final Report of the Inter-American Commission on Human Rights were denied in U.S. courts. The U.S. District Court for the Southern District of Indiana denied a habeas petition and petition to stay his execution filed by Garza. On June 14, 2001, the Seventh Circuit Court of Appeals also rejected Garza's petition seeking a stay of his execution pending his appeal of the district court order, finding "no indication in the treaties Garza relies on that the parties to the treaties intended for the Inter-American Commission's reports to create privately enforceable rights and ample evidence that they did not." The court also indicated that "[t]he language of the Commission's statute similarly shows that the Commission does not have the power to bind member states. The Commission's power is only to make 'recommendations,' which, according to the plain language of the term, are not binding." *Garza v. Lappin*, 253 F.3d 918, 925 (7th Cir. 2001). Petitioner applied to the Supreme Court for a stay of execution and petitioned for a writ of certiorari, which were denied on June 18, 2001. *In re Garza*, 121 S.Ct. 2543 (2001). Mr. Garza was executed. Excerpts from the U.S. brief in opposition to the petition to the Supreme Court, filed June 2001, are provided below. Internal citations to the Petition have been deleted.



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ARGUMENT

1. Petitioner contends that the Commission's Report "is an expression" of treaty-based rights that are enforceable in his petition for a writ of habeas corpus under 28 U.S.C. 2241. As the court of appeals explained, however, neither the American Declaration, the OAS Charter, nor the Commission Report gives petitioner any judicially enforceable rights (footnote omitted).

a. In the Report, the Commission concluded that petitioner's sentences violate his rights under the American Declaration, and that his execution would violate the OAS Charter and the American Declaration. (Report ¶¶ 118, 120). In particular, the Commission concluded that the government's introduction, at petitioner's sentencing hearing, of four unadjudicated murders that he committed in Mexico violated Articles I, XVIII and XXVI of the American Declaration. (Report ¶ 120); see also (Report ¶¶ 87–112).

In invoking the Report, petitioner cannot contend that the American Declaration and the OAS Charter *by themselves* give rise to any rights that petitioner may enforce. As the court of appeals explained, international agreements, even those benefiting private parties, generally do not create private rights enforceable in domestic courts. See . . . *Edye v. Robertson (The Head Money Cases)*, 112 U.S. 580, 598 (1884) ("A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress. \* \* \* It is obvious that with all this the judicial courts have nothing to do and can give no redress."). An international agreement may be found to create such rights only when they are contemplated in the agreement itself. See Restatement (Third) of the Foreign Relations Law of the United States § 703, cmt. c (1989); *id.* § 907, cmt. a.; e.g., *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 373 (7th Cir. 1985).

There is no indication in either the American Declaration or the OAS Charter that those instruments are intended to create privately enforceable rights. Indeed, as the court of appeals rec-

ognized, the American Declaration does not even create rights and obligations on the part of States. Rather, it “is an aspirational document which, as [petitioner] admitted in his petition in the district court, did not on its own create any enforceable obligations on the part of any of the OAS member nations.” As for the OAS Charter: that document is an international agreement that has been ratified by the United States. But it does not give rise to individual, judicially enforceable rights. Among other things, the Charter authorizes the creation of the Inter-American Commission “to promote the observance and protection of human rights and to serve as a consultative organ of [OAS] in these matters.” OAS Charter (Amended), Feb. 27, 1967, art. 112, 21 U.S.T. 691. The Charter further states that “[a]n inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.” *Ibid.* But nothing in the Charter creates any independent, privately enforceable rights. Nor, indeed, does petitioner identify any provision of the Charter that was allegedly violated by the government’s introduction at his capital sentencing hearing of the evidence of the murders in Mexico.

Even if the American Declaration or the OAS Charter by themselves gave rise to any privately enforceable rights, which they do not, that fact would not assist petitioner in seeking relief at this time in a petition for habeas corpus. Rights arising under treaties, just as rights arising under the Constitution, are subject to principles of procedural default. See *Breard v. Greene*, 523 U.S. 371, 375–376 (1998) (per curiam). Petitioner failed to invoke the American Declaration or the OAS Charter at trial, on direct appeal, or in his first motion under 28 U.S.C. 2255 (1994 & Supp. V 1999). Any claims under those documents would be procedurally defaulted, and petitioner could not raise them now on collateral review. See *Bousley v. United States*, 523 U.S. 614 (1998). Moreover, as the court of appeals noted, any filing raising them now would, without question, be a second or successive motion, barred by the gatekeeping provisions of Section 2255, paragraph 8. Nor would a defaulted claim of error brought directly under the American Declaration or the OAS Charter fit within the savings clause permitting review under 28 U.S.C. 2241 when Section 2255 is “inadequate or ineffective to test the legality of [a pris-

oner's] detention." 28 U.S.C. 2255 (1994 & Supp. V 1999). The mere failure to satisfy the gatekeeping requirements does not make Section 2255 "inadequate or ineffective." See, e.g., *Reyes-Requena v. United States*, 243 F.3d 893, 901–902 (5th Cir. 2001).

b. Petitioner therefore relies on the proposition that the Report of the Inter-American Commission "created" a judicially enforceable right to have his death sentences vacated. An examination of the instruments that form the basis for the Commission's action, however, reveals that the Commission is not empowered to "create" such rights.

The Commission's governing document is the Statute of the Inter-American Commission on Human Rights, which has been adopted by the OAS General Assembly.<sup>12</sup> The Statute recognizes a distinction between rights created by the OAS Charter and the American Declaration, on the one hand, and rights created by the American Convention on Human Rights (American Convention), on the other. The American Convention is an international human rights treaty that creates the Inter-American Court of Human Rights. That court's decisions, the court of appeals stated, are potentially binding on the parties to the American Convention. The United States has signed the American Convention, but has not ratified it, so the United States is not a party to the American Convention.

With respect to countries, including the United States, who are members of OAS but have not become party to the American Convention, the Statute gives the Commission the following powers relevant to petitioner's case:

[T]o make recommendations to the governments of the states on the adoption of progressive measures in favor of human rights in the framework of their legislation, constitutional provisions and international commitments, as well as appropriate measures to further observance of those rights; \* \* \*

[T]o pay particular attention to the observance of the human rights referred to in Articles I, II, III, IV, XVIII,

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<sup>12</sup> The Statute of the Inter-American Commission on Human Rights is available on Westlaw at 2000 BDPHRIAMS 113.

XXV, and XXVI of the American Declaration of the Rights and Duties of Man; [and] \* \* \*

[T]o examine communications submitted to it and any other available information, to address the government of any member state not a Party to the [American] Convention for information deemed pertinent by this Commission, and to make recommendations to it, when it finds this appropriate, in order to bring about more effective observance of fundamental human rights.

Statute of the Inter-American Commission on Human Rights, Oct. 1979, arts. 18(b), 20(a) and (b). As the court of appeals explained, those provisions, and the provisions of the OAS Charter, indicate that the Commission's determinations are not binding on the United States and its courts:

Nothing in the OAS Charter suggests an intention that member states will be bound by the Commission's decisions before the American Convention goes into effect. To the contrary, the OAS Charter's reference to the Convention shows that the signatories to the Charter intended to leave for another day any agreement to create an international human rights organization with the power to bind members. The language of the Commission's statute similarly shows that the Commission does not have the power to bind member states. *The Commission's power is only to make "recommendations," which, according to the plain language of the term, are not binding.*

(emphasis added).

Petitioner contends that the Commission is empowered to make binding rulings on violations and "recommendations" as to remedies. That distinction has no grounding in either the Statute or the OAS Charter. Petitioner identifies no language that empowers the Commission to bind the United States government, let alone to bind its courts. Petitioner's contention that the Commission's recommendations are binding on United States courts because the Commission believes that they are fails for the same reason. The Commission's governing Statute empowers it to make

only “recommendations,” and recommendations do not create rights in individual citizens of the United States that are enforceable in the United States courts. Rather, the non-binding recommendations of the Commission are, as the court of appeals properly concluded, addressed to the Executive Branch.<sup>13</sup>

Consistent with the view that the Commission’s recommendations are properly addressed to diplomatic channels for consideration by the Executive Branch, the Executive Secretary of the Inter-American Commission wrote on June 14, 2001, to the Secretary of State to reiterate the conclusions reflected in the Commission’s Report. See Letter from Jorge E. Taiana, Executive Secretary, Inter-American Commission on Human Rights, to Colin L. Powell, Secretary of State. The letter further requested the government to indicate its response to those recommendations. The United States Ambassador to OAS yesterday responded to the Executive Secretary by reiterating that the United States does not agree with the Commission’s conclusions that petitioner’s rights under the American Declaration were violated and that the government adheres to “our consistent view that the petition is manifestly groundless.” Letter from Thomas A. Shannon, Ambassador and Acting Permanent Representative to the Organization of American States, to Jorge E. Taiana, Executive Secretary, Inter-American Commission on Human Rights 2 (June 15, 2001). The letter reaffirms the position of the United States that the Commission lacks authority to make binding findings or requests, such as the Commission’s request for “precautionary measures”

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<sup>13</sup> Because the question whether a particular international agreement creates judicially enforceable rights is answered by the terms of *that* agreement, petitioner’s citations of court decisions that purportedly recognize the authoritative nature of interpretations by other international bodies of other international agreements are beside the point. In any event, the only court of appeals decision that petitioner cites did *not* hold that the interpretation by the international body was binding on the United States courts. See *United States v. Duarte-Acero*, 208 F.3d 1282 (11th Cir. 2000). Rather, the court made an extensive independent examination of the relevant international agreement, in one part of which it gave the views of the international body significant but not controlling weight. See *id.* at 1284–1288; see also *Knight v. Florida*, 528 U.S. 990, 998 (1999) (Breyer, J., dissenting from denial of certiorari) (finding the views of the European Court of Human Rights and other foreign courts “useful even though not binding”).

to prevent petitioner's execution, and indicates that "we consider this request a non-binding recommendation."<sup>14</sup>

Those ongoing diplomatic communications reinforce the conclusion of the court of appeals that it is for the Executive Branch, in exercising its authority over foreign relations, not for the courts, to determine what effect to give to the Commission's Report. Cf. *Breard*, 523 U.S. at 378 (noting that it is the role of the Executive Branch, "in exercising its authority over foreign relations," to "utilize diplomatic discussions" to address treaty issues that were found not to be cognizable in court). As petitioner acknowledges, no court of appeals has disagreed with that conclusion. Cf. *Roach v. Aiken*, 781 F.2d 379, 380–381 (4th Cir.) (finding it "doubtful at the very best" that an adjudication by the Inter-American Commission on Human Rights could have any effect in a habeas case; "we are not advised that the United States has any treaty obligation which would require the enforcement, in the domestic courts of this nation, state and federal, of any future decision of the Commission favorable [to the capital defendant in that case]"), cert. denied, 474 U.S. 1039 (1986).

In sum, the process for adjudicating complaints brought before the Commission does not contemplate the issuance of binding, individually enforceable determinations of treaty-based rights. Rather, the Commission is empowered to issue recommendations, which the member States are entitled to address diplomatically in such fashion as they see fit in light of relevant foreign relations interests. The United States has not interpreted the Commission's Report as creating any rights cognizable in petitioner's habeas corpus petition, and the court of appeals correctly held that his claims based on the Report provide no basis for a stay of petitioner's execution.

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<sup>14</sup> Petitioner contends that the participation by the United States in the proceedings before the Commission somehow amounts to a concession that the recommendations of the Commission are binding on the United States and its courts. That is not so. Indeed, as Ambassador Shannon's letter reflects, the United States has consistently taken the contrary view, both before the Commission and in our filings in the United States courts, that the Commission has no power to bind the United States. See, e.g., Reply of the Government of the United States to Jan. 27, 2000 Pet., Case No. 12.243, Juan Raul Garza.

\* \* \* \*

**b. Capital punishment where crime committed under age 18**

On October 18, 2001 the Inter-American Commission on Human Rights issued a Preliminary Report with respect to Michael Domingues pertaining to the legality of executions of 16- and 17-year-old offenders under international law. Case No. 12.185. Prior to issuance of the Preliminary Report, the United States had submitted its Response to the May 1, 2000 Petition to the Inter-American Commission on Human Rights of Michael Domingues. The United States requested that the Commission declare the petition inadmissible under Commission Regulation 34 (a) and (b), on the grounds that it fails to state facts that constitute a violation of rights set forth in the American Declaration of the Rights and Duties of Man ("American Declaration") and is manifestly groundless.

The Petition in this case claims that the execution by the State of Nevada of a death sentence imposed on Mr. Domingues would violate the international obligations of the United States under the American Declaration, the treaty obligations of the United States, customary international law, and a *jus cogens* norm of international law because he was only sixteen years old at the time he committed the murder for which the death penalty was imposed. The United States Response provided the facts and procedural history of the Domingues case and set forth its views that the execution of a person under eighteen years old violates no obligation under international law to which the United States is bound.

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**FACTS AND PROCEDURAL HISTORY**

On October 22, 1993, sixteen-year-old Michael Domingues brutally murdered Arjin Chanel Pechpo and her four-year-old son, Jonathan Smith.

Following a jury trial in the Eighth Judicial District Court of Nevada, Clark County, Domingues was convicted of first-degree

murder, first-degree murder with a deadly weapon, burglary, and robbery with use of a deadly weapon. Domingues was sentenced to death for each of the two murder convictions, and the Supreme Court of the State of Nevada affirmed the conviction. [*Domingues v. Nevada*, 112 Nev. 683] 917 P.2d 1364 (Nev. 1996). The United States Supreme Court denied Domingues' petition for a writ of *certiorari*. 519 U.S. 968 (1996). Subsequently, Domingues filed a motion in state court for the correction of an illegal sentence; he claimed that, because he was sixteen years old at the time of the murders, his execution would violate the International Covenant on Political and Civil Rights as well as customary international law. The state trial court denied the motion, and the Supreme Court of Nevada affirmed the lower court decision, based on the fact that the United States had ratified the Covenant with a reservation that exempted the United States from the Covenant's bar on the execution of juvenile offenders. *Domingues v. State*, 961 P.2d 1279 (Nev. 1998). Thereafter, the United States Supreme Court denied Domingues' petition for a writ of *certiorari*. *Domingues v. Nevada*, 120 S.Ct. 396 (U.S. 1999).

## ARGUMENT

### I. Imposition of Capital Punishment on Juvenile Offenders Does Not Violate Any Treaty Obligation of the United States.

\* \* \* \*

#### A. The United States Has Accepted No Obligation Under Any Instrument Within the Competence of This Commission Regarding the Execution of Juvenile Offenders.

Petitioner incorrectly asserts that the American Declaration creates a binding obligation on the United States not to execute juvenile offenders. Petitioner's reliance on the Declaration is misplaced for two important reasons. First, as the United States has consistently asserted before this Commission, the American Declaration does not create binding legal obligations. Second, by its plain language, the American Declaration recognizes only the right to life;



it does not prohibit either the death penalty or the execution of juvenile offenders.

Further, the United States, as noted, is not a party to the American Convention. Therefore, none of the Convention's provisions are applicable.

**B. The United States Has Accepted No Obligation to Prohibit Capital Punishment for Juvenile Offenders Under The International Covenant on Civil And Political Rights.**

Petitioner claims that Mr. Domingues' execution would constitute a violation of U.S. obligations under the ICCPR. While petitioner correctly notes that article 6(5) of the ICCPR prohibits the execution of juvenile offenders, the United States made a valid, effective reservation to this provision. Accordingly, it is under no obligation to prohibit the imposition of the death penalty in this case.

***1. The United States' Reservation to Article 6(5) Is Valid and Effective as a Matter Of International Treaty Law.***

Making reservations to international agreements is a well-established feature of treaty law and practice by which a state may decline to accept certain provisions of a treaty. *See* Vienna Convention on the Law of Treaties (Vienna Convention), May 23, 1969, art. 2(1)(d), 1155 U.N.T.S. 332, 8 I.L.M. 679; *see also* Restatement (Third) of the Law of Foreign Relations of the United States § 313 (1987)(Restatement). As recognized by the United Nations International Law Commission, this rule applies equally to human rights instruments like the ICCPR. Report of the International Law Commission on the Work of its Forty-Ninth Session, 12 May–18 July 1997, U.N. GAOR, 52nd Sess., Supp. No. 10, at 94, PP 44–45, U.N. Doc. A/52/10 (1997). Indeed, the ILC Special Rapporteur has concluded no exception to the Vienna Convention is necessary for human rights or other normative treaties. *See id.*

Under treaty law and practice, if treaty partners disapprove of a reservation made by the United States to a treaty, those part-

ners may object to the reservation. The provisions to which the reservation relates do not apply as between the reserving and objecting states, unless the objecting state indicates that it declines to recognize a treaty relationship with the reserving state. Out of the 149 states that are parties to the ICCPR, only 11 have objected to the United States' reservation to Article 6(5). *See* Multilateral Treaties Deposited with the Secretary General: Status as at 31 Dec. 2000, U.N. Doc. ST/LG/SER.E/19 (2001). Significantly, *not one* of these States noted that it does not recognize the ICCPR as being in force between itself and the United States. Unambiguous State practice under the ICCPR, therefore, supports the validity of the United States' reservation to Article 6(5). *See* Vienna Convention, art. 20(4)(b) (objection by a contracting state to another state's reservation to part of a treaty does not prevent the treaty from entering into force between the two states unless such an intention "is definitely expressed by the objecting State").

Furthermore, while states are prohibited from making reservations incompatible with a treaty's object and purpose, to defeat the "object and purpose" of a treaty, a reservation must be incompatible with the agreement as a whole. There is no bright-line standard for application of the object and purpose test; rather, the International Court of Justice (ICJ) endorses a case-by-case analysis of multilateral treaties to determine what sort of reservations, if any, could be made, and what their effect would be, based on the treaty's "character[,] . . . purpose, provisions, mode of preparation and adoption." Reservations to Convention on Prevention and Punishment of Crime of Genocide, 1951 I.C.J. 15 (May 28) [hereinafter Genocide Convention case]. Under the ICCPR it is extremely significant that *not one State Party* asserted that it was not in a treaty relationship with the United States. In accordance with practice under the Vienna Convention, the U.S. reservations were presumed accepted one year after ratification by the other 138 States Parties that had not objected within twelve months.<sup>2</sup> *See* Gerard Cohen-Jonathan, *Les Reserves dans les*

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<sup>2</sup> Moreover, as noted above, with respect to those states objecting, only Article 6(5), not the ICCPR as a whole, can be deemed not to apply as between the United States and objecting States.

Traites Relatifs aux Droits de L'Homme, 4 Revue Generale de Droit International Public 915, 920 (1996).

The U.S. reservation to Article 6(5) is not contrary to the overall object and purpose of the ICCPR, which generally fosters respect for civil and political rights including: the right to self-determination, the right to equal protection of law, the right to be free from slavery, the right not to be subjected to torture, the right to a fair trial, freedom of religion, and freedom of assembly. The United States has undertaken an obligation to guarantee those rights safeguarded by the ICCPR; however, it has exercised its sovereign right to limit its treaty obligations with regard to others. A reservation to Article 6(5), which addresses only one provision of a treaty that addresses a wide range of civil and political rights, does not constitute a rejection of the treaty's overall object and purpose.

***2. There Is No Correlation Between Non-derogability of A Right Under Article 4 of the ICCPR and the Centrality of that Right to the Treaty.***

Petitioner appears to allege that by making certain provisions, notably article 6(5)'s prohibition of the execution of juvenile offenders, non-derogable during times of emergency, the ICCPR, and therefore States Parties thereto, have expressed an intent that no reservation to article 6(5) is permissible. This claim has no basis in fact or law.

Although article 4(2) of the ICCPR makes Article 6(5) non-derogable in times of emergency, . . . the derogability of a provision is very different from the validity of reservations. . . .

If the parties to the Covenant had intended to prohibit reservations to Article 6(5), they could have so provided explicitly, as authorized by Article 19(b) of the Vienna Convention. Making the article non-derogable during times of emergency does not, however, mean that reservations are not permitted. Accordingly, as a matter of treaty law, the United States' reservation to Article 6(5) is valid and effective.

## II. Imposition of the Death Penalty on Juvenile Offenders Does Not Violate Customary International Law.

### A. There Exists No General And Consistent State Practice Based on *Opinio Juris* Sufficient to Establish A Customary International Legal Prohibition of The Execution of Juvenile Offenders.

There is no customary international legal principle prohibiting the execution of sixteen and seventeen year old offenders. Customary international law is international law resulting from a general and consistent practice of states followed by them from a sense of legal obligation, or *opinio juris*. See Carter [and] Trimble, *International Law* (3rd), 1999, 134–136 (citing J. Starke, *Introduction to Law* (9th ed.) 1984, 34–38; Restatement § 102(2)).

In this instance, there is no uniform state practice regarding the execution of juvenile offenders. There are at least fourteen additional States that do not have domestic laws that prohibit the imposition of the death penalty on persons who committed a capital offense when under the age of eighteen,<sup>3</sup> including: Afghanistan, Burundi, Bangladesh, the Democratic Republic of the Congo, India, Iran, Iraq, Malaysia, Morocco, Myanmar, Nigeria (excepting federal law), Pakistan, the Republic of Korea, Saudi Arabia and the United Arab Emirates.

Further, there is no evidence of the requisite *opinio juris* to indicate the existence of a customary international legal principle prohibiting the execution of sixteen and seventeen-year-old offenders. For *opinio juris* to exist, there must be a “sense of legal obligation, as opposed to motives of courtesy, fairness, or *moral-ity* . . . and the practice of states recognizes a distinction between obligation and usage.” Brownlie, *Principles of Public International Law* (5th), 1998 (emphasis added).

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<sup>3</sup> See *Sixth quinquennial report of the Secretary General on capital punishment, reported in UN Doc. E/2000/3* (Mar. 31, 2000), at p. 21 and FN 36 (“There are at least 14 countries which have ratified the Convention on the Rights of the Child without reservation but, as far as is known, have not yet amended their laws to exclude the imposition of the death penalty on persons who committed the capital offence when under 18 years of age.”)

Here, the petitioner presents absolutely no evidence that those States that have passed laws prohibiting the execution of juvenile offenders have done so out of a sense of legal obligation to do so, that is, a legal obligation arising from customary law rather than from a treaty. . . .

**B. The Existence of International Instruments Prohibiting the Execution of Juvenile Offenders does not Establish A Customary International Legal Principle to This Effect.**

Although certain international instruments prohibit the execution of juvenile offenders, these instruments neither bind the United States on this point nor create a new norm of customary international law. For example, Article 6(5) of the American Convention recognizes that capital punishment shall not be imposed upon persons who were under the age of eighteen at the time the crime was committed. *See* American Convention on Human Rights, Nov. 22, 1969, art. 4(5), 1144 U.N.T.S. 123, 125, 9 I.L.M. 673, 676. Nonetheless, Article 6(5) was approved only by a two vote margin, with 40% of the assembled states abstaining from voting in favor of the provision. Accordingly, the mere existence of such a provision in this instrument cannot support a claim that this standard is recognized as a norm of customary international law, certainly not in the Americas. *Digest of U.S. Practice in International Law*, Vol. I, p. 882 (1981–1988) (*citing* United States Memorandum to Edmundo Vargas Carreno, Executive Secretary of the Inter-American Commission on Human Rights (July 15, 1986)).

The Convention on the Rights of the Child also contains a prohibition against the death penalty for persons who were under 18 at the time of their offenses. *See* Convention on the Rights of the Child, Nov. 20, 1989, art 37(a), G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49 at 167, U.N. Doc. A/11/19, 28 I.L.M. 1118, 1470. The United States agreed, however, to the adoption by consensus of the provision against capital punishment for juvenile offenders only on the condition that it retained the right to ratify the Convention with a reservation on this point. *See* Commission on Human Rights, Report of the Working Group on

a Draft Convention on the Rights of the Child, 45th Sess., 2 Mar. 1989, at 101, U.N. Doc. E/CN.4/1989/48.

As indicated above, the ICCPR also includes a prohibition on the execution of juvenile offenders in Article 6(5), which states: “[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.” Although there was no separate vote on the words “shall not be imposed for crimes committed by persons below eighteen years of age,” Article 6(5) was adopted by fifty-three votes to five, with fourteen abstentions. Commission on Human Rights, 12th Session (1957), A/3764, § 120 (o), [A/C.3/SR.820, § 25]; *See* Bossuyt, M.J., *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights*, p. 143 (Martinus Nijhoff Publishers 1987). The fact that more than one third of the countries either abstained from the vote or opposed Article 6(5) does not provide corroboration for the claim that this rule is recognized as a norm of customary international law.

Moreover, recent attempts to negotiate instruments that state that international law “clearly establishes” that the imposition of the death penalty on persons aged under eighteen at the time of the offense is in “contravention of customary international law” have failed. For example, at the last meeting of the U.N. Commission on Human Rights, a draft decision of the Sub-Commission for the Promotion and Protection of Human Rights reported in UN Doc. E/CN.4/2001/2, at 14, which put forth such a proposition, failed to be adopted by the Commission. . . . [C]ustomary international law does not prohibit the execution of juvenile offenders.

### C. The United States has Persistently Objected to the Development of A Customary International Legal Principle Prohibiting the Execution of Juvenile Offenders.

Even if the execution of sixteen and seventeen-year-old offenders were prohibited by customary international law—which it is not—the United States has consistently and persistently objected to the application of such a principle to the United States. It is generally accepted that a state may contract out of a custom in the process of formation by persistent objection. *See* Restatement (Third) Foreign Relations Law of the United States 102 cmt. d

(“In principle a dissenting state which indicates its dissent from a practice while the law is still in the process of development is not bound by that rule of law even after it matures.”). On this basis, therefore, the United States would not be bound by such principle if it existed.

As a matter of domestic law, the laws of many states within the United States provide for the prosecution of juveniles as adults for the most serious crimes, either automatically or after a transfer review process. Half of the states in the United States permit juveniles to be prosecuted as adults in certain capital cases: five states have chosen age seventeen as the minimum age and, in eighteen states, sixteen is the minimum age. Persons under sixteen years of age at the time of the crime may not be subject to capital punishment in the United States, as the U.S. Supreme Court held that such executions would violate the U.S. Constitution. *See Thompson v. Oklahoma*, 487 U.S. 815 (1988) (executions of offenders age fifteen at the time of their crimes are unconstitutional).

In addition to the positions taken during the negotiation of the instruments described above, *see supra* at Section II.—B., the United States has persistently asserted its right to execute juvenile offenders in multiple international fora, such as the United Nations General Assembly, the United Nations Commission on Human Rights, responses to U.N. Special Rapporteurs, the Council of Europe, the Organization for Security and Cooperation in Europe, the Organization of American States, and the Inter-American Commission on Human Rights. *See, e.g., In Re Roach*, Case 9647, ¶ 38 (g)–(h) (Inter-Am.C.H.R. 1987); UNCHR Res. 2001/68 (Apr. 25, 2001) calling for a moratorium on executions (27-18(United States)-7); *see also* UNCHR Res. 2001/45 (Apr. 23, 2001) on extra-judicial, summary or arbitrary executions and UNCHR Res. 2001/75 (Apr. 25, 2001) on the rights of the child which called upon all states “in which the death penalty has not been abolished, to comply with their obligations as assumed under relevant provisions of international human rights instrument”; *see also* Brief of the United States in *Domingues v. Nevada*, 120 S.Ct. 396 (U.S. 1999).<sup>5</sup>

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<sup>5</sup> The only limited exception to the United States’ policy regarding capital punishment of juveniles is its ratification of the Fourth Geneva Convention, which prohibits imposition of the death penalty against a national of another country held during time of war who was under 18

In sum, the United States cannot be bound by any customary international legal principle purporting to prohibit the execution of juvenile offenders given its persistent objection to the application of any such standard to the United States.

### III. There Exists No *Jus Cogens* Prohibition on the Execution of Juvenile Offenders.

A *jus cogens* norm holds the highest hierarchical position among all other international norms and principles. As a consequence, *jus cogens* norms are deemed to be non-derogable. Shaw, Malcolm N., *International Law* (4th) 1997, at 544. For a norm to be *jus cogens*, the international community of States as a whole must accept and recognize not only the norm but also its peremptory character. Vienna Convention on the Law of Treaties, art. 53; *see also* Restatement of Foreign Relations Law of the United States (Third) § 102(3).

\* \* \* \*

There is no *jus cogens* norm that establishes eighteen years as the minimum age at which an offender can receive a sentence of death. In order to so hold, the Commission would have to decide that this alleged prohibition has similar force to prohibitions such as those against piracy and genocide. There is simply no support for this proposition.

*In Re Roach* addressed the United States' use of the death penalty in the separate cases of James Terry Roach and Jay Pinkerton. When Roach was seventeen years old, he committed the rape and the murder of a fourteen-year-old girl and the murder of the girl's boyfriend; similarly, Pinkerton committed murder in the course of a burglary with the intent to commit rape, when he was seventeen years old. In *In Re Roach*, the Commission found that in the member States of the Organization of American States there was a recognized norm of *jus cogens* that prohibits

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when he committed the offense. *See* Geneva Convention Relative to the Protection of Civilian Persons in time of War, Aug. 12, 1949, art. 68, 6 U.S.T 3516, 3560, 75 U.N.T.S. 286, 330. This does not vitiate the United States' status as a persistent objector, however. The Fourth Geneva Convention addresses only the specific case of foreign nationals held during time of war, and does not address the imposition of capital punishment by a country on its own citizens or aliens in its country in time of peace.



the State execution of children. See *In Re Roach*, Case 9647, ¶ 56 (Inter-Am.C.H.R. 1987). Notably, the Commission did not find that there was a *jus cogens* norm that prohibits the imposition of the death penalty for 16–18 year old offenders. Indeed, the Commission refused even to find that such a prohibition existed in customary international law.<sup>6</sup>

The petition before the Commission in this case presents no evidence to support a finding to the contrary today. . . .

## CONCLUSION

The appellate process in the United States affords those convicted of capital offenses the very highest level of due process. The United States does not treat the imposition of the death penalty lightly or subject capital cases to mere cursory review. On the contrary, the U.S. appellate process provides avenues for both state and federal court review of every criminal conviction. To safeguard the due process rights of defendants, some appeals are automatic and provide for mandatory direct appeal of capital sentences. In general, appellate review in the United States ensures that defendants' trials are fair and impartial, that convictions are based on substantial evidence, and that sentences are proportionate to the crime.

\* \* \* \*

The Inter-American Commission made a Preliminary Report on October 15, 2001, before it received the United

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<sup>6</sup> The Commission also remarked that the diversity of state practice in the United States, regarding the imposition of the death penalty and the minimum age limit, "resulted in a patchwork scheme of legislation" and "[made] the severity of the punishment dependent . . . on the location where [the crime] was committed." *In Re Roach*, Case 9647, ¶ 61–62 (Inter-Am.C.H.R. 1987). The implication that there was inequality before the law unless all fifty states maintained uniform laws was contradictory to the foundation of a federal system. The keystone of a constitutionally formulated federalism was the division of political and legal powers between two systems of government. *Knapp v. Schweitzer*, 357 U.S. 371 (1958). Under a federal system, states were expected to have different laws, because "[e]ach has the power, inherent in any sovereign, independently to determine what shall be an offense against its authority and to punish such offenses." *United States v. Wheeler*, 435 US 313, 320 (1978)(quoting *United States v. Lanza*, 260 U.S. 377, 382 (1922)).

States Response of October 18. On December 19, 2001, the United States submitted its observations on the Commission's Preliminary Report. It noted that the Commission had not considered the October 18 United States Response to the Petition and incorporated it in its Observations by reference. The Observations elaborated on the views of the United States that customary international law does not prohibit the execution of juvenile offenders and that the United States is not bound by an international norm prohibiting the execution of juvenile offenders. It also asserted that Rule 33 of the Commission's Rules of Procedure requires withdrawal of the Report, as set forth in the excerpt below.

The full text of both United States submissions is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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Rule 33 of the Rules of Procedure of the Inter-American Commission on Human Rights expressly provides that "the Commission shall not consider a petition if its subject matter . . . essentially duplicates a petition pending or already examined and settled by the Commission." The Commission previously examined the precise question presented in the instant case and found that while there was a *jus cogens* norm prohibiting the execution of children, there did not exist "a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty." [*Case of Jay Pinkerton and James Terry Roach*, Resolution No. 3/87, Case 9647, Inter-Am. Cm. H.R. 1986-87, 147 OES/Ser.L/VII/71, doc. 9, rev. 1 (1987) ¶ 60.]

Clearly, the Domingues petition presents exactly the same issues as raised in the *Roach* case, as reflected in the Report's extensive treatment of the *Roach* opinion. Accordingly, this petition should be dismissed under Rule 33. Given the failure to follow Commission rules, it should withdraw this Report [fn. omitted].

\* \* \* \*

The Report asserts that "the United States, itself rather than persistently objecting to the standard, in several significant respects

recognized the propriety of this norm, for example by prescribing the age of 18 as the federal standard for the application of capital punishment and by ratifying the Fourth Geneva Convention without reservation,” *see* CRP ¶ 85, however, the Commission reached the *opposite conclusion* in *Roach*, on exactly the same set of facts. *See* Resolution 3/87 ¶ 54. As the Commission pointed out in *Roach*, “[s]ince the United States has protested the norm, it would not be applicable to the United States should it be held to exist. For a norm of customary international law to be binding on a State which has protested the norm, it must have acquired the status of *jus cogens*.” *Roach* ¶ 53.

The Report identifies no statement or action of the United States since the *Roach* decision that would belie its previous persistent objection to the application of such a norm to the United States. Indeed, the United States has consistently asserted its right to execute juvenile offenders—by making reservations to treaties, by filing briefs before national and international tribunals, and by making public statements.<sup>16</sup> There is simply no basis for a finding to the contrary.

Accordingly, even if a norm of customary international law establishing 18 to be the minimum age for imposition of the death penalty has evolved since *Roach*, which it has not, the United States is not bound to such a rule, given its status as a persistent objector, a fact recognized by this very Commission in *Roach* (fn. deleted).

\* \* \* \*

### **c. Resolution on death penalty**

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 25, 2001, Ambassador George Moose explained the vote of the United States on 2001/68, Death Penalty, as follows:

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<sup>16</sup> Perhaps the most telling example of the United States’ persistent objection to the application of such a norm to the U.S. was its reservation to ICCPR article 6(5)—which was made after the *Roach* decision. . . .

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The United States cannot support L. 93 as drafted. International law does not prohibit the death penalty when due process safeguards are respected and when capital punishment is applied only to the most serious crimes.

Each nation should decide for itself through democratic processes whether its domestic law should permit capital punishment in accordance with international law.

In the United States there is public debate on the use of capital punishment, but the American public is of one mind that when the death penalty is used, due process must be rigorously observed by all governmental bodies at all governmental levels.

Accordingly, the U.S. has requested a vote and is once again compelled to vote against this resolution.

## **2. Resolution on Extrajudicial, Summary or Arbitrary Executions**

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., the United States on April 24, 2001, explained its position on 2001/45, Extrajudicial, Summary or Arbitrary Executions, as follows:

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. . . [W]e strongly supported the aspirations of this resolution and supported its adoption by consensus. With respect to preambular paragraph 9, however, the United States has fundamental concerns about the International Criminal Court Treaty, the subject of that paragraph [“[w]elcom[ing] the fact that a large number of States have already signed and/or ratified or acceded to the Rome Statute of the International Criminal Court”].

Accordingly, the United States wishes to make clear that it does not support preambular paragraph 9.

Also, the United States wishes to make clear that it does not understand the reference in operative paragraph 8 to “states complying with their obligations assumed under Article 37 of the Convention on the Rights of the Child” to modify the mandate of the Special Rapporteur. The mandate of the Special Rapporteur

is dealt with in operative paragraph 15. The United States believes the Special Rapporteur should focus on summary and arbitrary executions as specified in that paragraph and should not exceed this scope.

### 3. Resolution on Enforced or Involuntary Disappearances

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 23, 2001, Michael Dennis, U.S. Delegation, explained the United States position on 2001/46, Enforced or Involuntary Disappearances, as follows:

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The United States is pleased to support the renewal . . . of the mandate of the Working Group on Enforced and Involuntary Disappearances and to commend them on their excellent work in support of the families of the disappeared.

However, Mr. Chairman, we must also restate our opposition to the establishment of an inter-sessional, open-ended working group as proposed in [Operative Paragraph “OP”] 12 of the revised text in the separate document. Although we understand the motivations of the supporters of this idea and the importance of mechanisms designed to address enforced or involuntary disappearances, in our view this would clearly duplicate work now being handled by other international instruments and by two existing treaty bodies.

Mr. Chairman, we note further that there is a basic contradiction in the proposals contained in OP 11 and OP 12. OP 11 calls for the appointment of an independent expert to examine whether there exist “any gaps” in the current protections with regard to enforced or involuntary disappearances. OP 12 would create, simultaneously, a new working group that would begin work on a new, legally-binding instrument even before knowing whether the study of the independent expert reveals any need for such an instrument. Clearly, the proposed creation of a working group is, at best, premature.

For this reason, Mr. Chairman, we propose an amendment deleting OP 12, which would establish the working group.

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#### 4. Impunity

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., on April 25, 2001, Ambassador George Moose explained the position of the United States on 2001/70, Impunity, as follows:

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. . . [M]y delegation regrets that it was obliged to abstain on the resolution on impunity.

The United States has a strong and abiding commitment to the principle of individual criminal responsibility, and the responsibility of states to end impunity and to prosecute those responsible for genocide, crimes against humanity, and serious violations of international humanitarian law.

However, the United States has fundamental concerns about the International Criminal Court Treaty.

Specially, the United States does not agree with Preambular paragraphs 8 and 10, as well as Operative paragraphs 3 and 4 [“[w]elcom[ing] . . . the recognition of the principle of complementarity in the Rome Statute” and “[a]cknowled[ing] the historic significance of the adoption of the Rome Statute and call[ing] upon all States to consider ratifying or acceding to it.”]

#### 5. Alien Tort Statute and Torture Victims Protection Act

The Alien Tort Statute (“ATS”), also often referred to as the Alien Tort Claims Act (“ATCA”), was enacted in 1789 and is now codified at 28 U.S.C. § 1350. It provides that the federal district courts “shall have original jurisdiction of any civil action by an alien for tort only, committed in violation of the law of nations or a treaty of the United States.” Over the past several decades, the statute has been given an expansive

reading by the federal courts in various human rights cases, beginning with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980). As one court has said, the ATS “creates a cause of action for violation of specific, universal and obligatory human rights standards which confer fundamental rights upon all people vis-à-vis their own governments.” *In re Estate of Marcos, Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied sub nom. Estate of Marcos v. Hilao*, 513 U.S. 1126 (1995). In *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), *cert. denied*, 518 U.S. 1005 (1996), jurisdiction under the Statute was upheld in an action against a non-state defendant (the purported head-of-state of the Republica Srpska) for alleged acts of genocide, torture and other violations of international law. By its terms, of course, this statutory basis for suit is not available to U.S. nationals.

The Torture Victims Protection Act (“TVPA”) was enacted in 1992 and is codified at 28 U.S.C. § 1350 note. It provides a cause of action in federal courts for individuals (regardless of nationality, including U.S. nationals) who are victims of official torture or extrajudicial killing against “[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation.” The TVPA contains a ten year statute of limitations.

#### **a. Scope**

##### **(1) *Tachiona v. Mugabe***

A number of citizens of Zimbabwe brought a class action under the ATS, the TVPA and customary international law against the President of Zimbabwe, Robert Mugabe, the Zimbabwean Foreign Minister, Stan Mudenge, and the Minister for Information and Publicity, Jonathan Moyo, as well as the country’s ruling political party, the Zimbabwe African National Union-Patriotic Front (ZANU-PF). They alleged that the defendants had planned and executed a campaign of brutality and violence within Zimbabwe aimed at intimidating and suppressing the political opposition in the months prior to the Zimbabwean national elections in 2000.

Among the specific acts alleged to have occurred were murder, extra-judicial killing, torture, terrorism, rape, beatings, and destruction of property. Service of process was effected on Mugabe and Mudenge at an unofficial fund-raising event in New York City during their visit to attend a conference at the United Nations. At the request of the U.S. Department of State, the U.S. Department of Justice filed a suggestion of immunity with the court on their behalf.

In a lengthy opinion, the U.S. District Court for the Southern District of New York determined that President Mugabe and his Foreign Minister were entitled to immunity under the customary international law doctrine of head of state immunity, as well as under the Convention on Privileges and Immunities of the United Nations. (Since Minister Moyo had not been served, the court did not address the question of jurisdiction over him.) However, it also held that the President and Foreign Minister were not immune from service of process in their roles as agents of ZANU-PF, and service upon them in that capacity did not transgress their personal inviolability but was sufficient to establish jurisdiction over the political party itself. (*See* the discussion of immunity questions in this case in Ch. 10.B.1.)

The Court dismissed the claims against the President and Foreign Minister and, since ZANU-PF had not appeared to defend itself, entered a default judgment against it.

With regard to its substantive jurisdiction under the ATS, the TVPA, and the general federal-question jurisdictional statute, the court found that the ordeals of torture, extrajudicial killings and other atrocities which plaintiffs asserted were within the scope of the conduct encompassed by the TVPA and violations of international law cognizable under the ATS. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001).

The following excerpts from the court's opinion (FOOTNOTES OMITTED) elaborate on this issue.

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As a preliminary matter, it is noteworthy that the default judgment authorized here is rendered not against particular individuals representing ZANU-PF but presumably against the collective entity itself in whatever legal form it exists. This result gives expres-



sion to a vital modern reality. Though much of international law reflects the view that only sovereign states are the subjects of international law, entitling only them to invoke rights and possess duties derived from the law of nations, this notion has come increasingly under question. Even classical formulations of the concept admitted exceptions for some private acts committed by individuals, such as genocide, war crimes, piracy and slave trading.

More recently, prompted by the wider recognition and assertions of international human rights, the rights and roles of individuals as subjects of international law—as both victims and violators—have assumed greater prominence and have been given broader expression in the development of international norms. An offshoot of these developments is growing recognition of a reality reflected in the matter now before this Court. Barbaric offenses committed in violation of established international standards do not always spring from spontaneous acts of violence wreaked by random individuals or government agencies. Rather, they sometimes represent the culmination of elaborate schemes devised by expertly-organized and well-financed private groups. These entities give their causes names, banners and emblems for their doctrines and recruits, and bank accounts with which to carry out their inglorious business. The wrongful enterprise may seek political or economic ends and, not uncommonly, as is alleged here, may derive critical nurture and command from the not so invisible hand of the state or from rogue government officials who share the lawless and injurious goals of the particular group or venture and who use the cover of law to promote its private ends. At times, the masterminds and managers who hatch these plans are high-ranking leaders of the state who then employ public and private surrogates to implement their unofficial deeds. Under some circumstances, such as those prevailing here, the leaders may be eligible to assert some form of official immunity from court jurisdiction, or may otherwise possess the methods and means to escape personal liability for actions carried out by the subordinates used as accomplices and pawns.

Like all other civil remedies, the causes of action authorized by the ATCA and TVPA are intended to compensate victims and punish and deter the perpetrators. Were liability in such cases to be limited so as to permit recovery only from the particular natural individuals who actually commit the underlying wrongful

acts, the result would effectively nullify the purposes of the statutes. Frequently the role of specified front-line actors in larger conspiracies is merely to execute the plans or follow orders issued by the scheme's leaders and institutional organizers. The lesser participants, though no less responsible, may have the least ability to evade jurisdiction or to satisfy a judgment of liability. Conversely, to exempt the organized perpetrators would allow an escape for actors with primary responsibility, encourage subterfuge and release the only players who may possess the resources to enable collection on any judgment rendered to the victims of the unlawful scheme.

Though the courts have not specifically addressed these concerns in the few recorded instances where claims against organized political organizations and other private entities have been lodged alleging violations of international norms, such claims have been sustained, giving recognition to the application of international law to some conduct of private actors. These cases have entailed the application of widely recognized international human rights standards to impose individual liability on organized non-state actors under two distinct circumstances: (1) when the individuals' deeds are done in concert with governmental officials or with their significant assistance, which thus may be deemed to constitute state action or conduct taken under the color of state law; and (2) when the individuals commit acts independently of any state authority or direction, especially encompassing more egregious conduct, such as genocide, war crimes or other crimes against humanity.

In significant respects, the development of international law in this area parallels the history of sovereign immunity of states, described above, that gave rise to the FSIA and comparable legislation in other countries. These statutes were designed to prevent the abuses associated with states engaging in trade through essentially private corporate entities cloaked with sovereign immunity. Just as under some interpretation and application of the FSIA, individuals acting in official capacities now may be regarded as embodying agencies and instrumentalities of the state, and as such may be entitled to assert sovereign immunity, some non-state entities should be deemed individuals for the purposes of effectively applying statutes like the ATCA and the TVPA that rely

upon state action as an element of liability, at least when the private schemes are significantly incubated, aided or carried out in concert with government officials.

## 1. The Alien Tort Claims Act

The ATCA confers upon federal district courts “original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” Thus, to satisfy subject matter jurisdiction under the ATCA, three conditions must be satisfied: the action must be (1) brought by an alien; (2) alleging a tort; (3) committed in violation of international law. Neither of the first two elements are disputed here: all named Plaintiffs are citizens of Zimbabwe, and the allegations state well-recognized torts. It is the nature and scope of the third element which require closer legal scrutiny. The ATCA, unlike the TVPA, does not explicitly require that the wrongful conduct be carried out under actual or apparent authority or color of law of a foreign state. Nonetheless, whether such a requirement exists as a matter of customary international law and therefore constitutes a corollary condition to satisfy subject matter jurisdiction in an action under the ATCA has been the subject of significant debate.

In applying the ATCA to allegations of official torture, the Second Circuit in *Filartiga* declared: “Thus it is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today [citing 630 F.2d at 881].” In *Kadic*, addressing the evolution of related principles fifteen years after *Filartiga*, the Circuit Court reaffirmed this instruction [citing 70 F.3d at 239]. There, the court rejected the notion “that the law of nations, as understood in the modern era, confines its reach to state action,” and ruled instead that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.”

The Second Circuit then held that among the specific acts which violate contemporary international norms, whether committed by state officials or private individuals, are genocide and war crimes. With regard to torture and summary execution, the court declared that, when not perpetrated in the course of geno-

cide or war crimes, these acts are proscribed by international law only when committed by state officials or under the color of law. In this connection, the Court instructed that applicable principles from the jurisprudence of § 1983 of the Civil Rights Act should guide the courts in reaching those determinations.

In the case at bar, the complaint alleges that, acting under Mugabe's command and control, ZANU-PF officials inflicted a "brutal campaign of murder, torture, terrorism, rape, beatings, and destruction of property against Zimbabwean citizens and residents suspected of supporting the opposition political party. . . ." The mission of terror was specifically designed to perpetuate Mugabe's rule and secure the dominant position of power held by ZANU-PF in the executive and legislative branches of Zimbabwe's government since 1980. The complaint avers that the deliberate and systematic wrongs alleged were inflicted with the participation and assistance of the Zimbabwe military, Central Intelligence Organization, Republic Police and the Zimbabwe War Veterans Associations ("ZWVA").

More specifically, Plaintiffs claim that ZANU-PF "has relied on its position as the unrivaled and dominant force in the Government to illegally direct and force the military and police to assist in the unlawful activities of ZANU-PF and ZWVA." According to the complaint, for example, ZANU-PF employed government officials and other public resources in its unlawful activities. The party allegedly engaged and paid the ZWVA and its operatives \$20 million to form an organized force of armed militias charged with invading and occupying the land of ZANU-PF's political opponents, especially targeting white farmers. These farm occupations resulted in thousands of recorded incidents of violence in the course of which, while police looked on and took no action, some Plaintiffs suffered physical attacks or their relatives were killed. Plaintiffs assert that ZANU-PF's violent movement employed other Zimbabwe government equipment and facilities, such as transportation, communications and coordination, and, at Mugabe's behest, was placed under the command of Zimbabwe's Head of the Air Force.

These accusations amply demonstrate that ZANU-PF did not consist merely of loosely connected, haphazardly organized individuals, or a misguided mob of marauders randomly roving and

unleashing terror throughout Zimbabwe. Rather, Plaintiffs' factual assertions and supporting evidence suggest that in carrying out the drive of organized violence and methodic terror portrayed here ZANU-PF worked in tandem with Zimbabwe government officials, under whose direction or control many of the wrongful acts were conceived and executed. On the facts presented, ZANU-PF thus became an integral arm of the state through which its apparent power extended to the wrongdoers. Accordingly, the Court concludes that Plaintiffs' claims allege conduct taken by ZANU-PF in concert with Zimbabwe officials or with significant assistance from state resources sufficient, under *Kadic's* instruction, to satisfy the standard of what constitutes involvement by government officials in the conduct of non-state actors. Plaintiffs' allegations and related evidence support the "color of law" and state action requirements for the purposes of Plaintiffs' action against ZANU-PF under the ATCA.

## 2. The Torture Victim Protection Act

The TVPA recognizes a cause of action for victims of official torture and extrajudicial killing against "[a]n individual . . . [acting] under actual or apparent authority, or color of law, of any foreign nation. . . ." While the statute creates a cause of action, it does not itself, unlike the ATCA, confer federal court jurisdiction. A victim seeking to exercise the right to sue established by the statute must rely upon a grant of federal jurisdiction provided in some other enactment, most notably the ATCA itself.

The TVPA's legislative history confirms that the state action condition was intended to make clear that a plaintiff "must establish some governmental involvement in the torture or killing to prove a claim" and that the statute "does not attempt to deal with torture or killing by purely private groups." The state action requirement was underscored by the Second Circuit in *Kadic*, where the court stated that torture and summary execution "are proscribed by international law only when committed by state officials or under color of law." The Circuit Court there also provided guidance with regard to the interpretation of the TVPA's state action or color of law requirement that mirrors the court's analysis and application of the ATCA. It instructed that in con-

struing the terms “actual or apparent authority” and “color of law,” principles of agency law and the jurisprudence under § 1983 of the Civil Rights Act would serve as a relevant guide. To this end, the court recognized that private individuals may act under color of law for TVPA purposes when they act in concert with state officials or with significant state aid.

The underlying unlawful and injurious campaign carried out by ZANU-PF, as described above, allegedly employed government equipment and facilities such as transportation, communications and coordination, and were under the command of Zimbabwe’s Air Force at the behest of Mugabe. Plaintiffs’ assertions of involvement or significant assistance by high-ranking Zimbabwe government officials in ZANU-PF’s campaign of torture and summary killings that form the basis for the color of law element of Plaintiffs’ claim under the ATCA also serve to satisfy the jurisdictional prerequisite as regards their TVPA cause of action. Accordingly, the Court concludes that Plaintiffs have established subject matter jurisdiction for their claim against ZANU-PF under the TVPA and that Plaintiffs’ motion for entry of default judgment against ZANU-PF should be granted on this ground as well.

(2) *Alvarez-Machain v. United States*

Dr. Alvarez-Machain was detained in Mexico in 1990 by Mexican nationals, at the behest of the U.S. Drug Enforcement Administration, for transportation to the United States where he was arrested and tried on charges connected with his alleged involvement in the torture and murder of DEA Special Agent Enrique Camarena-Salazar in Guadalajara, Mexico in 1985. In the subsequent criminal proceedings against Dr. Alvarez-Machain, he contended that the federal courts lacked jurisdiction to try him because of the manner by which he was apprehended. The legality of his detention under U.S. law was upheld by the United States Supreme Court in *United States v. Alvarez-Machain*, 504 U.S. 655 (1992). He was subsequently acquitted and returned to Mexico. (See also *Digest 2000*, Chapter 6.G.4.).

In 1993, Dr. Alvarez-Machain brought this action against the United States, certain United States government officials

and various Mexican citizens. He sought to hold the individual U.S. government defendants liable under common law, the Alien Tort Statute, 28 U.S.C. § 1350 ("ATS"), and the U.S. Constitution. He also sought to hold the United States liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2674 ("FTCA"), and a Mexican national defendant, Jose Francisco Sosa, liable under the ATS. The district court dismissed the constitutional claims against the individual U.S. government defendants and substituted for them the United States, pursuant to the Westfall Act, 28 U.S.C. § 2679, on the common law tort and ATS claims. Thereafter, the court dismissed Alvarez's FTCA claims against the United States, but held Sosa liable under the ATS. The court concluded that Alvarez-Machain's transborder arrest violated a "specific, universal and obligatory" norm of international law against kidnapping and arbitrary detention. Dr. Alvarez-Machain won a judgment in the amount of \$25,000.

On appeal, the Ninth Circuit Court of Appeals held that Dr. Alvarez-Machain could sue the United States for false arrest. It rejected the United States Government's arguments that the arrest had been authorized under federal law and that the false arrest claim was precluded by the FTCA's exception for a claim "arising in a foreign country." It also affirmed the judgment against Sosa under the ATS based on the claim of state-sponsored abduction in violation of international human rights law, rejecting Sosa's contention that only violations of *jus cogens* are actionable. While finding that Alvarez-Machain lacked standing to sue based solely on a violation of Mexican sovereignty, the court concluded that his arrest and kidnapping were arbitrary because there was no Mexican warrant or any other lawful authority for his arrest. These actions "violated his rights to freedom of movement, to remain in his country, and to security in his person, which are part of the 'law of nations'." *Alvarez-Machain v. United States of America*, 266 F.3d 1045 (9th Cir. 2001).

The United States filed a Petition for Rehearing and Rehearing *en banc* on October 25, 2001. The excerpts from the Petition set forth below provide the arguments of the United States that the arrest in Mexico was authorized and that Sosa should not be held liable under the ATS for his

actions. The case was pending at the end of 2001.

The full text of the U.S. Petition, which includes a history of the case, is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## ARGUMENT

### **I. The Panel Ruling that Federal Law Enforcement Officials are Required to Obtain Express Consent of A Foreign Country Before Arresting A Person Outside of the United States Is Wrong, Conflicts with Prior Ninth Circuit Decisions, and Creates A Dangerous Precedent.**

A. The panel recognized that plaintiff could not pursue his false arrest tort claim against the United States if the arrest in Mexico was authorized by federal statute. The panel concluded that the arrest in Mexico was unlawful because it found that DEA lacks statutory authority to arrest a person outside of the United States without the host country's express permission. Under Ninth Circuit precedent, however, an agency's arrest authority is presumed to reach to the full extent of the underlying substantive criminal law the agency is charged with enforcing. Thus, a law enforcement agency's arrest authority applies outside the borders of the United States if the criminal statutes apply to extraterritorial acts. See *United States v. Chen*, 2 F.3d 330, 333 (9th Cir. 1993), *cert. denied*, 511 U.S. 1039 (1994). Contrary to *Chen*, the panel here simply elected to suppose that Congress would not have wanted the DEA to be able to arrest a person in a foreign country without that country's permission. The panel explained that if the DEA possesses the power to arrest a person in Mexico, without that country's permission, then "it reinforces the critics of American imperialism in the international community."

While in some areas of the law there is a presumption against extraterritorial application of the law,<sup>2</sup> that presumption does not apply to criminal statutes if the legislation implicates concerns that are not inherently domestic.<sup>3</sup> Here, the statute under

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<sup>2</sup> See *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244 (1991).

<sup>3</sup> See *United States v. Cotten*, 471 F.2d 744, 750-751 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973); *United States v. Corey*, 232 F.3d 1166, 1169



which Alvarez-Machain was charged *expressly* applies to acts outside of the United States. *See* 18 U.S.C. § 1201(a)(4), (e) (prohibiting kidnaping of internationally protected federal employees outside the United States). Accordingly, any presumption against extraterritoriality is irrelevant here. The only question here is whether DEA can enforce this statute in the locus where it expressly applies.

In addition to the crime under which plaintiff was charged, numerous other statutes enforced by federal law enforcement agencies explicitly apply to conduct outside of the United States, and they may also be implicated by the panel's ruling. *See, e.g.*, 18 U.S.C. § 1119 (murder of United States national in foreign country); 18 U.S.C. § 2332b (foreign terrorist activity); 18 U.S.C. § 175 (extraterritorial use of biological weapons); 18 U.S.C. §§ 351, 1751 (extraterritorial crimes committed against high government officials); 18 U.S.C. § 1956 (extraterritorial money laundering); 18 U.S.C. § 2339B (providing assistance to foreign terrorist organizations); 18 U.S.C. § 1116(c) (attacks on diplomats); 18 U.S.C. § 1203(b)(1) (hostage-taking); 49 U.S.C. § 1472(1) (carrying weapons or explosives aboard aircraft); 50 U.S.C. § 424 (extraterritorial jurisdiction over crimes relating to releasing national security information). In order for federal law enforcement officials to fully execute these criminal statutes, their arrest authority must have an equivalent extraterritorial scope.

The DEA's statutory arrest authority is very broad. A DEA agent is empowered by statute to "make arrests without warrant \* \* \* for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed \* \* \* a felony." 21 U.S.C. § 878(3). There is no basis for reading this expansive arrest authority as limited to the borders of the United States. To do so would render the DEA powerless whenever the suspect is not in the United States, as will frequently be the case when criminal laws apply to extraterritorial conduct. *See Cotten*, 471 F.2d at 751 ("[t]he effective operation of government cannot condone the hiatus in the law that a contrary construction would cause").

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(9th Cir. 2000). *See also United States v. Bowman*, 260 U.S. 94 (1922); *United States v. Vasquez-Velasco*, 15 F.3d 833, 838–839 (9th Cir. 1994).

In *Chen*, this Court held that INS has arrest authority outside the borders of the United States. The Court explained that when “Congress intended [a substantive criminal statute] to apply extraterritorially,” it could “infer from the broad language [authorizing the Attorney General to enforce immigration laws] that Congress intended to grant the Attorney General the corresponding power to enforce the immigration laws *both within and without the borders of the United States*.” 2 F.3d at 333 (emphasis added). Likewise, here, in order to enforce the many criminal laws that apply extraterritorially, the DEA’s “exercise of [extraterritorial power] may be inferred” because it is consistent with—indeed necessary to—“Congress’ \* \* \* legislative efforts to eliminate the type of crime involved.” *United States v. Thomas*, 893 F.2d 1066, 1068 (9th Cir.), *cert. denied*, 498 U.S. 826 (1990).

The statute that Alvarez-Machain was indicted for violating not only explicitly applies extraterritorially in certain circumstances (18 U.S.C. § 1201(e)), it also authorizes the Attorney General to seek military assistance in those circumstances (18 U.S.C. § 1201(f)) to enforce the statute. Given the strict constraints upon domestic use of the military (*see* 18 U.S.C. § 1385), such authority would serve no purpose if Congress had not conferred extraterritorial law enforcement powers upon federal law enforcement agencies.

Under governing Ninth Circuit precedent, these factors compel the conclusion that DEA has arrest authority outside of the United States. The panel ruling is in conflict with that precedent by, in essence, demanding an express grant of extraterritorial arrest authority. That ruling conflicts with prior Ninth Circuit precedent and warrants *en banc* review.

B. The panel’s ruling also warrants *en banc* review because it establishes a dangerous precedent that threatens to impair the ability of federal officials to arrest perpetrators of serious federal crimes who are harbored by foreign countries.

1. In concluding that the FBI has extraterritorial arrest authority,<sup>4</sup> the Office of Legal Counsel, like this Court in *Chen*, relied

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<sup>4</sup> Like the DEA, the FBI has authority to “make arrests without warrant for \* \* \* any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.” 18 U.S.C. § 3052.

upon the agency's broad arrest authority and the fact the crimes subject to FBI enforcement have extraterritorial application. See *Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities*, 13 Op. Off. Legal Counsel 163, 1989 WL 595835 (1989). The OLC opinion explained, "[i]n order for the FBI to have the authority necessary to execute these statutes, its investigative and arrest authority must have an equivalent extraterritorial scope." *Id.* at 167. That same rationale supports the DEA's arrest authority, as well. The panel's ruling to the contrary, thus, not only undercuts the DEA's authority, but also raises a cloud upon that of other law enforcement agencies.

2. Unilateral extraterritorial arrests are rare. The norm, of course, is to seek extradition or other forms of cooperation from the host country. There are important and extraordinary cases, however, that require law enforcement action without the consent of the host country. There is sometimes a steep diplomatic price to be paid for asserting this extraterritorial power. Nonetheless, Congress has granted such arrest authority to the FBI and the DEA and they may employ the authority where our Nation's paramount interests so dictate, even where the host state has not granted its permission. See Douglas Kash, *Abducting Terrorists under PDD-39: Much Ado about Nothing New*, 13 Am. U. Int'l L. Rev. 139 (1997). There also may be some instances where a host country permits such an arrest, but will not publicly acknowledge its consent, as the panel here required. In either case, it is vital to effective law enforcement that the government retain the ability to act, when necessary, outside the borders of the United States. "Abrogation of a nation's ability to abduct suspects wanted for heinous crimes, such as terrorism, only invites more such acts with the perpetrators seeking sanctuary in some sympathetic, anti-American, anti-justice nation." *Id.* at 155-156. "Due to modern political realities \* \* \*, abductions are at times the only viable option to bring a suspect within the criminal jurisdiction of the United States." *Id.* at 156. See also 131 Cong. Rec. 18,870 (1985) (Sen. Specter) (in enacting statute criminalizing murder of U.S. nationals abroad, explaining that "if the terrorist is hiding in a [foreign] country \* \* \*, where the government\* \* \* is powerless to aid in his removal, or \* \* \* is unwilling, we must be willing to

apprehend these criminals ourselves and bring them back for trial”). The rule adopted by the panel, however, undercuts that necessary option.

\* \* \* \*

## II. The Panel Erred In Holding that an Alleged False Arrest That Occurred In Mexico Is Not Barred by the FTCA’s Foreign Country Exception.

The FTCA bars recovery for “[a]ny claim arising in a foreign country.” 28 U.S.C. § 2680(k). As a limitation on the “the scope of the United States’ waiver of sovereign immunity,” this exception to liability under the FTCA must be strictly construed. *See Smith v. United States*, 507 U.S. 197, 201, 203–204 (1993). Here, the panel concluded that the alleged false arrest occurred in Mexico. Accordingly, any tort claim challenging the legality of that arrest in Mexico is barred by 28 U.S.C. § 2680(k).<sup>6</sup>

The panel attempted to avoid the FTCA’s foreign country exception by citing this Court’s “headquarter’s claim” rule. Under that rule, a claim may be asserted, notwithstanding § 2680(k), if a culpable “act or omission” occurred in the United States, even if the “operative effect” of the act or omission took place in a foreign country. *See Cominotto v. United States*, 802 F.2d 1127, 1130 (9th Cir. 1986); *Leaf v. United States*, 588 F.2d 733 (9th Cir. 1978).

The Supreme Court has explained, however, that the foreign country exception must be viewed together with 28 U.S.C. § 1346 which “waives the sovereign immunity of the United States for certain torts committed by federal employees ‘under circumstances where the United States, if a private person, would be liable to the claimant *in accordance with the law of the place where the act or omission occurred.*’” *Smith*, 507 U.S. at 200 (quoting 28 U.S.C. § 1346(b)) (emphasis in original). Here, the tortious “act” indisputably “occurred” in Mexico, and falls within the foreign country exception.

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<sup>6</sup> Recognizing that the DEA’s operations abroad may give rise to tort claims that are barred by § 2680(k), Congress has granted the Attorney General the discretion to pay such claims. *See* 21 U.S.C. § 904.

Moreover, none of the command decisions made in the United States, cited by the panel, were tortious. It is not a tort to procure the arrest of someone who has been indicted for a felony. The only reason the panel deemed the arrest tortious was that there was no Mexican arrest warrant, *i.e.*, that the arrest was unlawful under Mexican law. It is established, however, that liability under the FTCA cannot be predicated upon a violation of foreign law. *See United States v. Spelar*, 338 U.S. 217, 220–221 (1949) (Congress was “unwilling to subject the United States to liabilities depending upon the laws of a foreign power”). The panel’s ruling cannot be squared with the foreign country exception, is inconsistent with *Spelar* and warrants *en banc* review.

### III. The Panel Erred in Holding that A Transborder Arrest Authorized by the U.S. Government Was Actionable Under the Alien Tort Statute.

The panel erred in holding Sosa liable under the ATS for abducting and detaining Alvarez-Machain. That ruling was also predicated upon the panel’s holding that the arrest was not authorized under U.S. law. As we discussed above, that premise is erroneous.

Moreover, under the panel’s analysis, plaintiff’s transborder arrest and arbitrary detention claims against Sosa are only actionable because the seizure and detention occurred without the consent of Mexico. Thus, these ATS claims in reality turn upon an alleged infringement against Mexican sovereignty. As the Supreme Court recognized with respect to plaintiff’s seizure, *see Alvarez-Machain v. United States*, 504 U.S. at 669, such matters must be resolved as matters of State-to-State relations and not by a federal court. There are a variety of negotiated State-to-State remedies for a State-sponsored transborder arrest when such a remedy is deemed necessary and appropriate.<sup>7</sup> That State-to-State reme-

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<sup>7</sup> One State-to-State remedy for a transborder arrest is the return of the arrested party. *See* Restatement (Third) of Foreign Relations Law § 432 & cmt. c (1986). A second is negotiation and/or agreement to a treaty to resolve the dispute. A third is for the offended State to “receive reparation from the offending [S]tate.” *Ibid.* *See also* Security Council Resolution concerning Adolf Eichmann, U.N. Doc. S/4349 (23 June 1960).

dial regime is by agreement of the States involved, however, and does not entitle a plaintiff to an individual remedy.

The panel ruling to the contrary cannot be squared with prior Ninth Circuit precedent demanding that, to be actionable under the ATS, a right must be “specific, universal, and obligatory.” *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994), *cert. denied*, 513 U.S. 1126 (1995). To support its ruling, the panel cites an international agreement that was never ratified by the United States and a variety of agreements that, while discussing the general right to freedom of movement, do not address transborder arrest and, in any event, are not self-executing. The panel erroneously transformed these non-binding, non self-executing documents into binding obligatory rights that are actionable in federal court. It is well established, however, that when a treaty is non-self-executing, it “addresses itself to the political, not the judicial department; and the legislature must execute the [treaty] before it can become a rule for the Court.” *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829) (Marshall, C.J.).

In its opinion, the panel admits that “no international human rights instruments refers to transborder abduction specifically.” The lack of such a specifically recognized right should preclude the finding that the right is “specific, universal, and obligatory.”

Finally, the panel’s finding that Sosa’s seizure amounted to arbitrary detention erroneously focuses upon Mexican domestic law. The lack of a Mexican warrant does not render plaintiff’s detention by persons acting on behalf of DEA “arbitrary.” Prior to his detention, a federal grand jury determined that there was probable cause to believe that Alvarez-Machain had committed a felony. While the panel believed that the DEA should have obtained permission from Mexico before seizing Alvarez-Machain, the acts taken pursuant to a federal indictment “were pursuant to law” and cannot be deemed “arbitrary” and actionable under the ATS. *See Martinez v. City of Los Angeles*, 141 F.3d 1373, 1383–1384 (9th Cir. 1998).

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### (3) *Other cases*

In *Kruman v. Christie’s International PLC*, 129 F. Supp. 2d 620 (S.D.N.Y. 2001), eight individuals who either bought or sold

items through auctions conducted by Sotheby's, Christies, or both, sued on behalf of a class of all similarly situated persons alleging that an agreement between defendants with respect to buyers' premiums and commissions violated U.S. antitrust law (§§ 1 and 3 of the Sherman Act) as well as customary international law. With respect to the latter claim, the plaintiffs invoked the jurisdiction of the Alien Tort Statute, alleging that basic anticompetitive activities such as price-fixing have risen to the level of customary international law. The District Court for the Southern District of New York dismissed the claims, concluding:

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There is no substantial support for the proposition that there is an international consensus proscribing price fixing that fairly might be characterized as customary international law, much less an international consensus that price fixing gives rise to tort claims on behalf of victims. In consequence, it is unnecessary even to consider whether, as defendants maintain, violations of the law of nations require state action. *Id.* at 627 (footnotes omitted).

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In *Jogi v. Piland*, 131 F. Supp. 2d 1024 (C.D.Ill. 2001), the failure of law enforcement officers in Champaign County Illinois to inform a foreign national of his right to contact his consulate was held not to constitute a tort in violation of the law of nations or a treaty of the United States within the meaning of the ATS.

***b. Effect of settlement in foreign litigation***

Victims of the toxic gas disaster at the Union Carbide plant in Bhopal, India, filed suit in the Southern District of New York in late 1999, and amended their complaint in early 2000, asserting among other things a claim for civil damages under the Alien Tort Statute for damages caused by the gas leak disaster itself and for alleged violations of international norms of environmental, criminal and human rights law. In August 2000, the court dismissed the claims in their entirety.

On appeal, the Second Circuit Court of Appeals held *inter alia* that the 1989 settlement issued by the Supreme Court of India barred claims to the extent they sought civil remedies pertaining to unaddressed criminal liability arising from the incident. *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2nd Cir. 2001).

**c. *Effect of forum non conveniens***

In *Aguinda v. Texaco*, 142 F. Supp. 2d 534 (S.D.N.Y. 2001), the federal district court considered the application of the doctrine of *forum non conveniens* to two class action suits brought by citizens of Peru and Ecuador who sought to recover damages against an oil company for environmental damage and personal injury resulting from pollution in the rain forest and rivers of those two countries. The prior proceedings in these cases are set forth in *Aguinda v. Texaco, Inc.*, 945 F. Supp. 625 (S.D.N.Y. 1996), *reconsid. denied*, 175 F.R.D. 50 (S.D.N.Y. 1997), *vacated sub nom. Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

After reviewing the relevant U.S. law on *forum non conveniens*, with particular attention to *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), the district court concluded both (a) that the courts of Ecuador and Peru offered adequate alternatives for adjudication of these claims and (b) that the balance of private and public interest factors weighed heavily against the pursuit of these claims in the United States. In these cases, the court noted, none of the plaintiffs were U.S. citizens, nationals, or residents, unlike *Flatow v. Islamic Republic of Iran*, 999 F. Supp. 1 (D.D.C. 1998) (which held that *forum non conveniens* was inappropriate for claims under the state-sponsored terrorism exception to the Foreign Sovereign Immunities Act) and none of these cases was brought under the Torture Victims Protection Act as in *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2nd Cir. 2000) (declining to apply the doctrine in a case under the Torture Victims Protection Act).

The Court concluded on this basis that “[a] fortiori, the doctrine applies in undiminished fashion to ATCA suits that do not fall within the purview of the TVPA.” *Id.* at 554. It noted further that “Because Texaco has carried its burden on every



element of the motion [to dismiss], and because the record establishes overwhelmingly that these cases have everything to do with Ecuador and nothing to do with the United States, the Court grants the motion and dismisses the cases on the ground of *forum non conveniens*.” *Id.* at 537.

**d. Effect on U.S. foreign policy interests**

In a letter of October 31, 2001, the United States responded to a request from the U.S. District Court of the Central District of California to provide its views on the impact on U.S. foreign policy of continued litigation in *Alexis Holyweek Sarei v. Rio Tinto plc*, Case No. CV 00-11695 (C.D. Cal.). Plaintiffs in the case, current and former residents of Bougainville Island, Papua New Guinea (PNG), brought claims under the Alien Tort Statute against Rio Tinto Group, a UK/Australia-based mineral development conglomerate. The letter from William H. Taft, IV, Legal Adviser for the Department of State, filed with the court on November 5, 2001, is set forth below.

Mr. Taft’s letter, as well as the letter from U.S. District Court Judge Margaret M. Morrow of August 30, 2001, and the letter of October 17, 2001, with attachment, from the Government of Papua New Guinea to Susan Jacobs, U.S. Ambassador to Papua New Guinea, are available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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By letter dated August 30, United States District Court Judge Margaret M. Morrow solicited the opinion of the Department of State “as to the effect, if any, that adjudication of [the above-captioned] suit may have on the foreign policy of the united States.” . . . Although Judge Morrow advises that defendants have raised the act of state and political question doctrines in a motion to dismiss, she has not expressly invited the Department to comment on these legal doctrines.

The gravamen of plaintiffs’ claims is their assertion that defendants—in concert with the government of Papua New Guinea (PNG) and PNG officials—were responsible for despoliation of

the environment of Bougainville Island, PNG, as well as for the commission of various atrocities in the suppression of an uprising on the island. As described in Judge Morrow's letter, under the environmental claims, plaintiffs contend that defendants' mining operations as a joint venture partner with the PNG under the PNG's oversight destroyed the island's river system and fish supply, and polluted the atmosphere; under the "war crimes" claims, plaintiffs contend that defendant induced the PNG to impose a military blockade preventing medical supplies from reaching the island resulting in many civilian deaths, and also that PNG defense forces committed acts of torture, killing, bombing, rape and pillage. Plaintiffs assert that these actions violated international law, and that their claims against Rio Tinto are cognizable under the Alien Tort Statute, 28 U.S.C. § 1350.

The Department of State has previously expressed its concern over human rights abuses in Bougainville during the protracted civil war with PNG authorities there, in particular in the annual publication *Country Reports on Human Rights Practices*. It would not wish any statement made today to be taken to detract from those concerns. However, the court's inquiry focuses on the foreign policy consequences today of the pending litigation. In that regard, the Department has been encouraged by progress in the multilateral, United Nations-sponsored Bougainville peace process, which is seeking a comprehensive settlement to the Bougainville conflict. On August 30, the same date as Judge Morrow's letter soliciting our opinion on potential foreign policy effects of the suit, the PNG Government and representatives of the people of Bougainville concluded the Bougainville Peace Agreement. . . . Full implementation of that agreement—which provides, *inter alia*, for withdrawal of remaining PNG forces in Bougainville, for eventual establishment of an autonomous Bougainville Government, and for establishment of a commission to address human rights issues in Bougainville—will require sustained effort and maintaining a delicate political balance in the years ahead.

The success of the Bougainville peace process represents an important United States foreign policy objective as part of our effort at promoting regional peace and security. In our judgment, continued adjudication of the claims identified by Judge Morrow

in her August 30 letter would risk a potentially serious adverse impact on the peace process, and hence on the conduct of our foreign relations. According to local custom, the concept of “reconciliation” is at the heart of the peace process. We understand that acts of reconciliation have already occurred as a foundation to the August 30 agreement, and that adjudication in a foreign court of the issues alleged in this case could invalidate these steps and sweep away the basis of the peace agreement. Countries participating in the multilateral peace process have raised this concern with us as well.

The Government of Papua New Guinea, in particular, has stated its objection to these proceedings in the strongest terms, as set forth in the attached letter of October 17 from PNG Chief Secretary Robert Igara to U.S. Ambassador Susan Jacobs. . . . Clearly, the PNG perceives the potential impact of this litigation on U.S.-PNG relations, and wider regional interests, to be “very grave.” We cannot lightly dismiss such expressions of concern from a friendly foreign state.

***e. Statute of limitations***

The Alien Tort Statute itself contains no statute of limitations. A federal district court in California thus had to determine whether the statute could support a suit by Chinese and Korean nationals against Japanese corporations seeking compensation for forced and slave labor required of them during World War II. Looking to analogous federal law, the court determined that the ten-year statute of limitations in the Torture Victims Protection Act, 28 U.S.C. § 1350 note, should apply. Since plaintiffs had not indicated any reason why their claims could not have been brought within ten years of the end of the war, the court determined that they were barred by the statute of limitations. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1160 (N.D. Cal. 2001).<sup>1</sup>

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<sup>1</sup> This case is one of several lawsuits filed in California courts by plaintiffs seeking to recover from defendant Japanese companies damages for back wages and injuries allegedly suffered as prisoners of war during

See also *Estate of Caballo v. Fernandez-Larios*, 157 F. Supp. 2d 1345 (S.D.Fla.2001) (TVPA statute of limitations applied to ATS by analogy).

**f. Attorneys' fees**

In 1993, twenty-two Muslim citizens of Bosnia-Herzegovina brought an action under the Statute (as well as the Torture Victims Protection Act) for damages for acts of genocide, war crimes, crimes against humanity, torture and other violations by individuals under the command of Gen. Radovic Karadzic in Republica Srpska. In *Kadic v. Karadzic*, 70 F.3d 232 (2nd Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996), the Court of Appeals held that suits could be sustained jurisdictionally under the Statute against "non-state actors." Subsequently, after Karadzic failed to appear and comply with discovery orders, a default judgment was issued in June 2000. After a two-week trial to determine the amount of damages, a jury awarded plaintiffs some \$4.5 billion in punitive and compensatory damages. Thereafter, plaintiffs' attorneys sought to recover more than \$2.3 million in costs and fees.

In *Doe I v. Karadzic*, 2001 U.S. Dist. LEXIS 12928 (S.D.N.Y. 2001), the court denied the request, noting that under the so-called "American Rule," litigants pay their own attorneys' fees

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WWII under Cal. Code of Civ. Pro. 354.6 and the ATCA. See discussion in *Digest 2000*, Chapter 8B.3. on this litigation. The court had earlier granted defendants' motion to dismiss the claims of the Allied prisoners of war under the Treaty of Peace with Japan because "[o]n its face, the treaty waives 'all' reparations and 'other claims' of the 'nationals' of Allied powers 'arising out of any actions taken by Japan and its nationals during the course of the prosecution of the war.'" *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 945 (N.D.Cal. 2000). Claims by Philippine nationals were also found barred because the Philippines was an Allied power for purposes of the treaty with Japan. *In re World War II Era Japanese Forced Labor Litigation*, 164 F. Supp. 2d 1153 (N.D.Cal. 2001). As to the California state law basis for the claims in the instant case by Korean and Chinese claimants (non-Allied prisoners of war), the court concluded that "section 354.6 is unconstitutional as applied to defendants in the case at bar because it infringes on the federal government's exclusive power over foreign affairs." 164 F. Supp. 2d at 1165.

absent a statutory provision or enforceable contract to the contrary. The court pointed out that Congress had not included a “fee-shifting provision” in the Statute, that “plaintiffs have cited no case—nor has the Court found any in its own research—that granted attorneys’ fees to a prevailing party under § 1350,” and that New York law did not provide otherwise.

## H. DETENTIONS

On April 4, 2001, the Inter-American Commission on Human Rights issued its decision on a petition concerning Rafael Ferrer-Mazorra et al., Report No. 51/01, Case 9903, finding that the detention of Cuban nationals who were part of the Mariel “Freedom Flotilla” (the “Mariel Cubans”) violated several provisions of the Inter-American Declaration of Human Rights. The full text of the decision is available at [www.iachr.org/annualrep/2000eng/ChapterIII/Merits/USA9903.htm](http://www.iachr.org/annualrep/2000eng/ChapterIII/Merits/USA9903.htm). The United States filed its Response to the preliminary report of the Commission, Report 85/00 of October 23, 2000, in this matter in November 2001. The Response noted that the United States had submitted four lengthy and detailed written filings during the period 1987–1999 and participated in hearings in this matter since it was initiated by a petition of April 10, 1987.

The United States also requested that the Commission publish its response. As a result, for the first time, the Commission has decided in the future to include a copy of the responses of member States in its web page ([www.cidh.org](http://www.cidh.org)) when this is expressly requested. See Annual Report of the Inter-American Commission on Human Rights to the General Assembly, OEA/Ser.G, CP/doc, 3579/02, Apr. 22, 2002, at 42.

Excerpts from the U.S. Response are provided below. The full text is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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The petitioners are approximately 367 Cuban nationals who arrived in the United States in 1980. Many of them were taken

from Cuban jails and sent here during the mass exodus of more than 125,000 undocumented aliens who illegally came to this country when Fidel Castro opened the Port of Mariel to Cubans who wanted to leave that country ("Mariel Cubans").

The petitioners claim that they are entitled to be admitted into the United States, despite their serious and repeated violations of this country's criminal laws, and despite the sovereign right of the United States, shared by all other nations, to regulate its borders. They also aver that they are being unlawfully detained, although few of the petitioners are even in custody at this time. All of the petitioners have been paroled into the United States one or more times, and the vast majority presently enjoy that status, many having been released after committing new crimes even while their petition was pending before this Commission.

\* \* \* \*

## SUMMARY OF RESPONSE

- 1. The United States disagrees with the conclusions of the Commission in this case, rejects the Commission's conclusions, and requests that the Commission withdraw, and refrain from publishing, Report 85/00.**

With regard to each implication or direct assertion in the Commission's report that the American Declaration of the Rights and Duties of Man itself accords rights or imposes duties, some of which the United States has supposedly violated, the United States reminds the Commission that the Declaration is no more than a recommendation to the American States. Accordingly, the Declaration does *not* create legally binding obligations and therefore *cannot* be "violated."

With regard to the substantive legal and policy aspects of this case, the United States maintains all of the points made repeatedly to the Commission in the four major written submissions cited above, and during hearings before the Commission in this case. The United States will not reiterate all of those points in full here, but asserts the continuing validity of all points previously made, and refers the Commission to the record in this case.

\* \* \* \*

From a review of the Commission's Report, it is the impression of the United States that virtually the entire decision rests on, or flows from, the Commission's unsupported and insupportable assertion that there exists in international human rights law a rebuttable presumption that everyone has a right to freedom, in whatever country he is located and no matter what his legal or immigration status in that country. The Commission cites no legally binding international instrument to which the United States is a Party or any other source of widely accepted or respectable authority for this proposition. In fact, the Commission has fashioned this so-called international human right out of whole cloth. No such right exists.

In addition to the arguments previously made for a finding of inadmissibility or dismissal of the petition, the United States wishes to inform the Commission that the petition duplicates the work of the United Nations Commission on Human Rights, and therefore must be dismissed in accordance with Article 33 of the Commission's regulations.

In particular, Article 33 provides that the Commission shall not consider a petition if its subject matter "essentially duplicates" a petition "already examined and settled by another international governmental organization of which the State concerned is a member." The issues raised by the petition in this case and the petitions (or "communications") submitted to the UN Commission on Human Rights in a so-called 1503 process case resolved on April 7, 1997 are essentially identical in all significant respects. This is particularly true with respect to the issues of detention of Mariel Cubans and their claim to have a right to be admitted into the United States.

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The United States has not raised the duplication issue previously because, like this Commission's process, the 1503 process of the United Nations is confidential. Consequently, the United States did not wish to mention the 1503 proceedings of 1997 in this case at all.

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At this stage . . . the United States has no choice but to invoke Article 33 and to inform the Commission that a superior body, the

United Nations Commission on Human Rights, voted on April 7, 1997 to discontinue consideration of a Mariel Cuban case that “essentially duplicates” (using the key term in Article 33) the petition in this case. The margin of decision by the UN Commission on Human Rights was 45 to 2, with 4 abstentions.

The most relevant provision of international (treaty) law binding upon the United States is Article 12, paragraph 1, of the International Covenant on Civil and Political Rights (ICCPR), which declares:

“Everyone *lawfully* within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.” (emphasis added)

However, this right and the right to leave any country, including one’s own, are subject to the potential restrictions set forth in paragraph 3, even for those lawfully in a State’s territory. Those restrictions must be provided by law and be consistent with the other rights recognized in the ICCPR, but nevertheless give the State broad authority and discretion, since restrictions may be based on national security, public order, public health or morals, or the rights and freedoms of others. Only paragraph 4 of Article 12 articulates a right that is absolute and can fairly be considered customary international law:

“No one shall be arbitrarily deprived of the right to enter his own country.”

It is exclusively Cuba’s failure to respect this international norm that has placed the petitioners in the situation about which they complain, not any act or omission by the United States. The fact that Cuba has not submitted to the jurisdiction of this Commission does not justify the Commission focusing its attention on the only other available target in this case, the United States.

With regard to Article 12(1) of the ICCPR cited above, it is unchallenged that petitioners have never been lawfully in the territory of the United States. Their presence has been unlawful from the outset. . . .

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. . . [T]he United States’ treatment of the petitioners—inadmissible aliens who committed violent and other serious new crimes in the United States *after* their arrival in the Mariel



boatlift—can also only be characterized as generous. The Report's conclusions that the petitioners have been subjected to arbitrary detention or unfairly burdened by inadequate custody review procedures cannot be reconciled with the facts of petitioners' own cases. Most have been released within the United States, despite their clear ineligibility to enter or reside lawfully in this country, and despite the dangerous criminal conduct with which they have repaid this extraordinary hospitality. The Report's conclusion that the fundamental authority of the United States to exclude dangerous aliens is somehow diminished, or that it is compelled by Cuba's irresponsible and unlawful actions to assume the risk of hosting dangerous aliens in its communities, is not supported by any article of the American Declaration. Indeed, the suggestion that such aliens are presumptively entitled to liberty because of the unlawful failure or refusal of their own government to honor its obligations to its nationals, and irrespective of such aliens' individual failure or refusal to comply with the host country's civil and criminal laws, squarely conflicts with several provisions of the same instrument, including Articles VIII, XIX, XXVII, XXIX, XXXIII.

At best, as mentioned above, the Report suggests a heretofore unknown rule of international law, to which no nation subscribes.

In addition to the discussion that follows in response to some of the Report's findings, the United States incorporates by reference here, and respectfully refers the Commission to, its previous responses in opposition to this petition. This exhaustive and informed analysis clearly demonstrates that the actions of the United States in relation to the uninvited and inadmissible aliens who arrived here during the Mariel boatlift have been, and continue to be, entirely consistent with domestic and international law. These actions fully respect the human rights of the petitioners and other Mariel Cubans, all of whom have access to a variety of administrative procedures and independent judicial review to ensure that they are treated justly and humanely.

Moreover, in that the United States continues in its efforts to persuade the Government of Cuba to repatriate Mariel Cubans who cannot or will not live lawfully in the United

States, the United States finds the Report (and the decision to publish it) particularly objectionable because of its potential to affect adversely and impermissibly ongoing diplomatic initiatives by the United States to resolve the current impasse with Cuba about repatriation of individuals such as petitioners, as well as efforts by officials of both governments to deter future illegal migration.

The Report's irresponsible assertion that, once here, even illegal migrants are entitled to liberty in the United States, can only encourage further unlawful, inherently dangerous attempts to migrate to the United States, with more loss of life in the process. Without justification, the Commission's Report also represents an inappropriate and significant intrusion into United States domestic matters, in that it has the potential to hamper, if not actually undermine, efforts by the United States to promote orderly immigration and contain serious concerns related to the illegal presence and removal of dangerous criminal aliens.

Subsequent events, including recent decisions of the United States Supreme Court, among them *Zadvydas v. Davis*, 533 U.S. [678], 121 S. Ct. 2491 (2001), and the September 11 terrorist attacks in New York and Washington, D.C., underscore the validity of the objections of the United States to the Commission's Report.

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## **I. REPRESENTATION**

### **1. Inter-American Democratic Charter**

a. The Organization of American States adopted an Inter-American Democratic Charter in September 2001. Excerpts below from remarks by Ambassador Roger Noriega to the Permanent Council Meeting of September 6, 2001, provide the views of the United States on the adoption of the Charter set forth below.

A text of the Charter is available at [www.oas.org](http://www.oas.org) under "About the OAS." The full text of the interpretative statement is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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- This Charter evidences the deep political commitment of OAS member states to promote and foster democracy in the hemisphere. It is the fulfillment of an important Summit mandate, and is faithful to the wishes of our heads of state as expressed in the Summit's Political Declaration and the Plan of Action.
- We understand this Charter to be in conformity with the OAS Charter and international law. Within that context, and with the Charter as a guide and instrument, we commit ourselves to continue to promote and defend those individual human rights and fundamental freedoms that are the elements of democracy.
- In this regard, we would note that the United States understands that this Charter does not establish any new rights or obligations under either domestic or international law. The United States also understands that the use of the term "peoples" in the Democratic Charter should not be construed as having any implications as regards the rights that may attach to the term under international law, as has been made clear in previous relevant Summit documents.
- This Charter expresses the profound conviction of all the inhabitants of the Americas that they have a right to democracy and that democracy is the only legitimate form of government in this Hemisphere.
- By strengthening and enhancing the ability of the OAS to promote and defend democracy, we are practicing a new and dynamic form of multilateralism that promotes our highest common values. It [is] a multilateralism that will establish in the Americas a region that trades in freedom and liberty. It is a multilateralism that builds bridges across the diversity that characterizes the Americas, uniting us in our fundamental right to determine our own destinies through our democratic governments and helping to create open societies in which the full potential of all our citizens can be realized.
- The Charter we have before us was the product of the most open and transparent negotiating process in the history of the OAS. It has been the object of extensive consultation within national governments and among civil society. In this regard, the Charter is the result of a consensus that is deep and broad.

b. At the Special General Assembly of the Organization of American States formally adopting the Charter on September 11, 2001, Secretary of State Colin Powell joined consensus for the United States prior to his emergency return to the United States in response to the attack on the World Trade Center in New York City that day. Excerpts from his statement are set forth below.

The full text is available at *[www.state.gov/secretary/rm/2001/5260.htm](http://www.state.gov/secretary/rm/2001/5260.htm)*.

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. . . [T]he vibrant democracy we see here in Peru is not simply the product of a few political leaders or an idea imported from abroad. It is the collective will of ordinary citizens who care about the future of this country. So too, the Democratic Charter that we adopt today reflects the will of all the peoples of the Americas who care about the future of our hemisphere. It is the fulfillment of the promise that our heads of state made to our peoples at the Summit of the Americas in Quebec in April.

It is a response to the demands of all of our peoples that they be assured a voice in shaping their destinies. That they have the means to hold their political leaders and institutions to account. And that they have the opportunities, resources, and security to claim their God-given right to personal and civic freedom—what the Founding Fathers of my own country called the inalienable right to life, liberty, and the pursuit of happiness.

Indeed, protecting and securing these fundamental rights has been a primary task of the OAS since our governments committed in 1948 to making the Americas a “land of liberty.”

In keeping with the spirit of democracy itself, this Democratic Charter was not drafted behind closed doors. The negotiating process was highly transparent. And the Charter is the outcome of an unprecedented process of broad public debate and consultation among institutions, governments and civil society throughout the Americas.

Indeed, it represents the first time ever that the OAS and member governments used the Internet to foster comment and discussion from all around the Hemisphere on a major diplomatic initiative.

The outcome is a Charter that declares democracy to be a birthright of all the peoples of the Americas.

A Charter that sets representative democracy as the only legitimate form of government in the hemisphere, and makes democracy an essential condition for participation in the OAS.

A Charter that addresses the elements of a working democracy—respect for human rights, a lively civil society, independent media, accountable institutions.

A Charter that recognizes that the hard work of democracy is not just done on election day, but every day.

A Charter that consolidates and enhances the ability of the OAS to help democracies in crisis.

A Charter that develops new ways to address the nascent and subtle threats facing democracy in the region.

A Charter that recognizes that the pressing social, economic, and environmental problems facing our Hemisphere can only be meaningfully addressed within a democratic context.

A Charter that also recognizes that democratic governments must make it a priority to address the basic needs of their citizens.

A Charter that makes the vital link between democracy, prosperity and peace.

The United States of America is proud today to join its partners in democracy throughout the hemisphere in adopting this groundbreaking document.

By doing so, the people of the United States stand with men and women of this hemisphere who cherish freedom and seek better lives for themselves and their children. And we look forward to the day when the people of Cuba will also enjoy the rights and benefits of democracy.

Those who live in peaceful, democratic societies with accountable leaders and institutions, open economies, and vibrant private sectors have the greatest chance of escaping the cruel grip of poverty. Democracy and free markets are closely linked. Political and economic freedoms are prerequisites for sustained growth and prosperity.

That is why President Bush is so deeply committed to pursuing another objective established at the Quebec Summit, the creation by 2005 of a Free Trade Area of the Americas. The great success of the North American Free Trade Agreement (NAFTA) in building ties and spurring prosperity among Canada, Mexico and the United States provides a compelling argument for a larger, hemispheric trade pact.

Democracy and trade are partners in freedom. Each creates conditions for the other. As President Bush has said, "when we promote open trade, we are promoting political freedom . . . open trade reinforces the habit of liberty that sustains democracy over the long haul."

And so, in adopting this Democratic Charter, my government also reaffirms its commitment to working with our fellow signatories to ensure that this hemisphere becomes, as President Bush has said, a region that "trades in freedom."

Expanded trade leads to more and better jobs, safer working conditions, bigger paychecks, and more competitive businesses. It creates opportunities, and provides the resources that foster development. As President Bush noted, "Open trade is not just an economic opportunity, it is a moral imperative. Trade creates jobs for unemployed. When we negotiate for open markets, we are providing new hope for the world's poor."

To help realize the full potential of free trade for our own citizens and for our trading partners all around the globe, the Bush Administration is working to obtain trade promotion authority from our Congress. Beyond trade promotion, my government is also working with other governments in the hemisphere to create conditions conducive to growth and development by defending human rights, combating drug trafficking, fighting corruption, and improving the administration of justice.

President Bush's proposed Andean Regional Initiative (ARI), for example, addresses compelling societal problems and recognizes the role that democracy can play in resolving them. It is no coincidence that half of ARI's funding destined for security and law enforcement and half is destined for development and democracy. The two must go together.

At the same time, my country is doing its part at home to reduce the demand for illegal drugs. Our funding for demand reduction programs has grown more than 60 percent over the last decade to \$ 5.8 billion in fiscal year 2001 alone.

Ladies and gentlemen, my government's strong support for the Democratic Charter, and our ongoing efforts to work with our hemispheric partners on issues affecting us all, underscore the dynamic community that exists among our governments and peoples.

Because we share fundamental values and important responsibilities, it is possible for us to achieve substantial results through multilateral cooperation. Results that rise well above the lowest common denominator. Results such as this Charter that advance our highest common ideals.

This is multilateralism at its finest. It is multilateralism that resonates throughout this hemisphere because it reflects the needs and hopes of our peoples. It is multilateralism that can be an example for the rest of the world.

For hundreds of years the Americas have been seen as a hemisphere of limitless potential. President Bush and I believe that the 21st century will be the one in which this great potential will be realized.

The immense promise of this hemisphere will be realized because for the first time, the right conditions will be put into place. Together, our nations have resolved that the Americas are to be guided by the principles of democracy. We have resolved that sovereignty resides in the people. That the rule of law must defend individual liberty. That human rights are to be enjoyed by all. That economic freedom promotes prosperity that can lift millions out of poverty. That political and economic freedoms are the instruments of lasting peace. And we have resolved to work together to put these principles into practice.

Ladies and gentlemen, the Democratic Charter that we adopt today establishes democracy as nothing less than the foundation upon which together we will build the future. It is now for all of us—citizens, governments and institutions together—to put the Charter's empowering provisions to work for the ordinary men and women of this hemisphere.

## **2. Inter-American Commission on Human Rights: Petition of Statehood Solidarity Committee**

In October 2001 the Inter-American Commission on Human Rights adopted a Preliminary Report on the petition of the Statehood Solidarity Committee, finding that lack of statehood for the District of Columbia puts the United States in violation of the American Declaration on the Rights and Duties of Man. The United States provided its observations on the Preliminary Report on December 18, 2001, as set forth below.

The text is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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As the United States has previously indicated, the petition submitted in Case No. 11.204 is inadmissible for the reasons detailed in the numerous submissions to the Commission. The petition in this matter fails to state a claim under the American Declaration on the Rights and Duties of Man (“Declaration”), and on this basis, the United States respectfully requests that the Commission withdraw Report No. 115/01 and order the petition dismissed.

First, petitioners have failed to allege facts that establish a violation of the right to vote as set forth in Article II of the Declaration. The decision to establish the District of Columbia as a federal enclave in which residents have voting rights that differ from residents of other areas of the United States was not based on any improper grounds as set forth in Article II. Instead, the decision was based on matters of federalism, unrelated to “race, sex, language, creed or any other factor.”

Likewise, the petition fails to establish a violation of Article XX of the Declaration. Neither the petition, nor the Commission’s Report identifies any standard—either in the Declaration or in international law—that would require participation in government in any particular manner. The framers of the U.S. Constitution, as well as its past and present citizenry, have devised a system of government that affords citizens of the District of Columbia certain rights with regard to participation in governance, both at the district and federal level. This is a matter properly within the discretion of the people of the United States.



Finally, the political system challenged by the petition is simply not appropriate for review, and even less for rejection, by the Commission. These are sensitive issues better left to domestic political processes. There is simply no basis for the Commission to substitute its judgment for the political debate and decision-making of the federal branches of the government of the United States.

## J. INDIGENOUS PEOPLE

### Summit of the Americas

At the OAS Summit of the Americas held in Quebec City, April 20–22, 2001, the United States agreed to adoption of a Declaration and Plan of Action using the term “indigenous peoples” as one of the groups whose human rights and fundamental freedoms must be respected. It did so, however, on the basis of language included in the Plan of Action as adopted, noting “that use of the term ‘peoples’ in this document cannot be construed as having any implications as to the rights that attach to the term under international law and that the rights associated with the term ‘indigenous peoples’ have a context-specific meaning that is appropriately determined in the multilateral negotiations of the texts of declarations that specifically deal with such rights.”

A full text of the Summit Documentation is available at [www.summit-americas.org/eng/quebec-summit1.htm](http://www.summit-americas.org/eng/quebec-summit1.htm).

## K. FREEDOM OF OPINION AND EXPRESSION

At the Fifty-seventh Session of the United Nations Commission on Human Rights, noted *supra* in 6.B.2.b., the United States on April 23, 2001, explained its position on Resolution 2001/47, Right to Freedom of Opinion and Expression, as follows:

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It is with regret that we withdraw our cosponsorship from L.56, the Right to Freedom of Opinion and Expression. The

acceptance of the amendment which refers to Article 4 of the Convention on the Elimination of Racial Discrimination causes us to do so.

We object in principle to the language to the extent it purports to bind states to treaty provisions whether or not they have been accepted by a particular state.

Let us also add that the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association. As the United States made clear upon its ratification of the Convention, the United States does not accept any obligation under this Convention, in particular under Article 4, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States.

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### **Cross References**

*Resolution on Human Rights and Terrorism*, **Chapter 3.B.1.e.**

*Reviewability of Secretary of State's decision to surrender fugitive alleging violation of Torture Convention*, **Chapter 3.A.3.**

*Trafficking in Persons*, **Chapter 3.B.4.**

*Claims by Nazi-era victims against Germany, Austria and France*, **Chapter 8.B.1.**

*Claims by "Comfort Women,"* **Chapter 10.A.2.**

*Consideration of labor issues in trade agreements*, **Chapter 11.E.1. and 2.**

*Governance and sustainable development*, **Chapter 13.A.5.**

*Response to OSCE inquiry concerning derogation from ICCPR*, **Chapter 19.B.6.c.**

## CHAPTER 7

# International Organizations and Multilateral Institutions

### A. CONVENTION ON SAFETY OF UNITED NATIONS AND ASSOCIATED PERSONNEL

#### 1. Transmittal to Senate for Advice and Consent to Ratification

On January 3, 2001, the President transmitted to the Senate for advice and consent to ratification the Convention on the Safety of United Nations and Associated Personnel adopted by the United Nations General Assembly by consensus on December 9, 1994, signed on behalf of the United States, December 19, 1994. The views of the Administration on the Convention and a proposed Understanding and Reservation are set forth below in excerpts from the Report of the Secretary of State to the President, included in the transmittal to the Senate. S. Treaty Doc. 107-1.

The full text of the transmittal documents, including the text of the Convention, is available at [www.access.gpo.gov/congress/cong006.html](http://www.access.gpo.gov/congress/cong006.html).

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Department of State,  
Washington, November 8, 2000.

The President,  
The White House.

The President: I have the honor to submit to you, with a view to its transmission to the Senate for advice and consent to ratifica-

tion, subject to an understanding and a reservation, the Convention on the Safety of United Nations and Associated Personnel, adopted by the United Nations General Assembly by consensus on December 9, 1994, and signed on behalf of the United States of America on December 19, 1994.

Pursuant to proposals by New Zealand and Ukraine, the United Nations General Assembly adopted Resolution 48/37 on December 9, 1993, which established an ad hoc committee, open to all States, to draft an international convention dealing with the safety and security of United Nations and associated personnel. During 1994, the ad hoc committee made substantial progress, and remaining issues were resolved by a working group of the Sixth (Legal) Committee of the General Assembly. The Convention was adopted by consensus by the full Sixth Committee on November 16, 1994, and by the General Assembly on December 9, 1994. It was opened for signature at the U.N. Headquarters on December 15, 1994. The Convention entered into force on January 15, 1999.

The Convention was drafted and negotiated on an urgent basis because of the increasing number of attacks on peacekeeping personnel acting pursuant to U.N. mandates, and the lack of effective legal remedies to address such attacks. Although persons who attack peacekeeping personnel usually violate the domestic law of the State in which the attack occurs, host States for U.N. operations often do not have the capacity or will to investigate and prosecute these individuals. By creating a regime of universal jurisdiction over such attacks, the Convention makes it more likely that persons who commit these grave offenses will be punished.

The Convention addresses attacks against United Nations and associated personnel, including certain multinational and national forces when they are engaged, deployed or assigned to carry out activities in support of the fulfillment of the mandate of a United Nations operation. The Convention does not cover those enforcement actions under Chapter VII of the U.N. Charter that involve international armed conflict in which the United Nations or associated personnel are engaged as combatants.

The Convention creates a legal mechanism which requires submission for prosecution or extradition of persons alleged to have committed attacks and other offenses against United Nations

and associated personnel as specified under the Convention. This mechanism is essentially the same as that used in a number of other Conventions involving crimes often committed by terrorists—including the Hague Convention for the Suppression of Unlawful Seizure of Aircraft of 1970, the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents of 1973 and the International Convention Against the Taking of Hostages of 1979. The United States is a party to each of these conventions. Many of the provisions of the new Convention are modeled on the provisions of these other conventions.

The major features of the Convention may be summarized as follows:

### **Definitions and Scope of Application**

In terms of its scope, Article 2(1) of the Convention provides that it applies in respect of “United Nations and associated personnel” and “United Nations operations” as those terms are defined in Article 1. Article 1 defines “United Nations personnel” as persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation, as well as other officials and experts on mission of the United Nations or its specialized agencies or the International Atomic Energy Agency, who are present in an official capacity in the area where a United Nations operation is being conducted. “Associated personnel” is defined as persons assigned by a Government or an intergovernmental organization with the agreement of the competent organ of the United Nations, persons engaged by the Secretary-General of the United Nations or by a specialized agency or by the International Atomic Energy Agency, and persons deployed by a humanitarian non-governmental organization or agency under an agreement with the Secretary-General of the United Nations or with a specialized agency or with the International Atomic Energy Agency. To be protected under the Convention, both U.N. and associated personnel must be assigned, engaged or deployed to carry out

activities in support of the fulfillment of the mandate of a United Nations operation.

“United Nations operation” is defined under Article 1 as an operation established by the competent organ of the United Nations in accordance with the Charter of the United Nations and conducted under United Nations authority and control (i) where the operation is for the purpose of maintaining or restoring international peace and security, or (ii) where the Security Council or the General Assembly has declared, for the purposes of this Convention, that there exists an exceptional risk to the safety of the personnel participating in the operation.

Under these definitions, therefore, the Convention applies to United Nations personnel engaged or deployed to carry out activities in support of the fulfillment of a U.N. mandate and who act under the authority and control of the United Nations. These individuals are commonly known as “blue-hats.” By virtue of its application to “associated personnel,” which can include multinational and national forces, the Convention covers not only these U.N. “blue-hatted” forces, but also forces and certain other personnel associated with a U.N. operation if they are assigned, engaged or deployed to carry out activities in support of the fulfillment of the mandate of the United Nations. Thus, the Convention should be read to cover personnel engaged in activities in support of the mandate of a U.N. operation, even in the absence of “blue-hatted” personnel. The United States intends to implement the Convention in a manner that will cover all those who assist in the maintenance or restoration of international peace and security pursuant to a U.N. mandate, and who are not excluded by virtue of Article 2(2) of the Convention. To ensure that this is clear to our treaty partners, I recommend that the following understanding to Article 1(b) be included in the United States instrument of ratification:

The United States understands that associated personnel within the meaning of Article 1(b) includes all persons assigned, engaged or deployed to carry out activities in support of the fulfillment of the mandate of a United Nations operation, with respect to whom the application of the Convention has not been excluded pursuant to

Article 2(2), without regard to the presence or absence of United Nations personnel engaged or deployed as members of a military component of a United Nations operation.

As noted above, a United Nations operation is an operation established by the competent organ of the United Nations and conducted under U.N. authority and control. An operation under U.N. authority and control might include, for example, one in which the operation's mandate is derived from Security Council action and includes detailed authority for national or multinational forces to take actions in fulfillment of a U.N. mandate. Although a determination of whether an offense is prosecutable under the Convention depends on a careful review of the facts and circumstances of the particular case, as a general matter NATO assistance to the U.N. Protection Force (UNPROFOR) in the former Yugoslavia, United States assistance under the Unified Task Force in Somalia (UNITAF), and the participation of the United States and others in the Multinational Force assisting the United Nations Mission in Haiti (UNMIH) would have rendered the relevant U.S. forces "associated personnel" within the meaning of the Convention had the Convention been in force at the relevant time. It also would cover operations in which the United States has been involved since the Convention came into force, for example U.N. operations in Bosnia and Kosovo.

Pursuant to Article 2(2), the Convention does not apply to a U.N. operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies. Thus, when personnel of a United Nations operation are engaged as combatants (like the conflict with Iraq in "Desert Storm"), they are covered by the laws of armed conflict, including the grave breaches provisions of the Geneva Conventions of 1949. Article 2(2)'[s] phrase "to which the law of international armed conflict applies," refers to the standard found in common article 2 of the 1949 Geneva Conventions, thereby making it clear that this Convention does not apply to situations covered by common article 2 of the Geneva Conventions. The United States specifically sought to achieve just this

type of dividing line. As a result, in enforcement actions under Chapter VII of the U.N. Charter where any of the personnel are combatants in a conflict “to which the law of international armed conflict applies,” the law of armed conflict will define the responsibilities and relationships between and among the parties to the conflict. When common article 2 of the Geneva Convention does not apply, for example in situations where personnel of a United Nations operation are not engaged as combatants or are deployed in situations involving internal armed conflicts, this Convention applies and serves to criminalize attacks on United Nations and associated personnel, their means of transportation, equipment and premises. In addition the Convention criminalizes attempts or threats to do any of the above, the ordering or organizing of others to commit such attacks, as well as participation as an accomplice in any attack or attempt.

The Convention’s Article 2(2) also makes clear that the law of international armed conflict, rather than the Convention, applies if any personnel are engaged as combatants in the conflict described in that Article pursuant to Chapter VII. Thus, only when any of the U.N. or associated personnel participating in an operation are engaged as combatants, does this Convention cease to apply for all such personnel. As a result, it is easier for participants in an operation to know under which legal protective regime they fall in a given situation, and to conform their conduct accordingly.

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### **Agreements on the Status of the Operation**

Under Article 4, the host State and the United Nations are required to conclude, as soon as possible, an agreement on the status of the United Nations operation and personnel, including provisions on privileges and immunities for military and police components of the operation. Having status of forces agreements in place prior to, or as soon as possible after, deployment ensures that there is a common understanding of the status of the sending States’ forces in the receiving State.

\*   \*   \*   \*

Article 22(1) provides that disputes between two or more States Parties over the interpretation or application of the



Convention that cannot be settled by negotiation shall, at the request of one of them, be submitted to arbitration. If the organization of such arbitration cannot be agreed upon within six months, any one of the parties to the dispute may refer it to the International Court of Justice. Under Article 22(2), a State Party may, at the time of signature, ratification, acceptance, approval or accession, declare that it does not consider itself bound by all or part of paragraph 1. Other States Parties shall not be bound by paragraph 1 or the relevant part thereof with respect to any State Party which makes such a reservation. In October 1985, the United States withdrew its declaration under Article 36 of the Statute of the International Court of Justice accepting the compulsory jurisdiction of the Court. Consistent with that decision, I recommend that the following reservation to Article 22(1) be included in the United States instrument of ratification:

Pursuant to Article 22(2) of the Convention, the United States of America declares that it does not consider itself bound by Article 22(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

This reservation would allow the United States to agree to an adjudication by a chamber of the Court in a particular case, if that were deemed advisable.

\* \* \* \*

Recommended legislation necessary to implement the Convention will be submitted to the Congress separately. The legislation will establish jurisdiction over offenses in accordance with Article 10(1) (mandatory jurisdiction) and Article 10(2) (optional jurisdiction).

\* \* \* \*

Respectfully submitted,  
Madeleine Albright.

## **2. Scope of Legal Protection under the Convention**

On October 10, 2001, public delegate William J. Hybl delivered the U.S. statement on Agenda Item 167 of the 56th

United Nations General Assembly Sixth Committee. The Item addressed a report by the Secretary-General suggesting several measures to enhance the Convention. The report is available at [www.un.org/law/cod/sixth/56/sixth56.htm](http://www.un.org/law/cod/sixth/56/sixth56.htm).

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My government also welcomes this opportunity to comment on the report of the Secretary-General on possible measures to enhance the Convention on the Safety of United States and Associated Personnel.

The Secretary-General's report suggests several measures to enhance the convention. I would like to comment on them.

First, the report recommends a procedure for initiating a Declaration by the UN Security Council or the General Assembly to give effect to Article 1(c)(ii) of the Convention. This article extends the protection of the convention if the Security Council or General Assembly "has declared for purposes of the convention that there exists an exceptional risk to the safety of personnel participating in the operation."

The United States has no objection to a study of possible procedures for initiating such a declaration in the Security Council. We believe the Security Council is the appropriate venue for consideration of this issue.

Secondly, the report recommends designating the Secretary-General as a certifying authority with regard to the existence of exceptional risk to UN and associated personnel. Such a certification would provide the basis for the Security Council's declaration that such risk exists, thus bringing the convention into effect.

The report indicates that questions as to the status of "United Nations and Associated Personnel" are likely to arise in connection with an inter-state request to prosecute or extradite. It suggests that the Secretary-General should be designated as the certifying authority for these and other similar questions under the convention, and that the Secretary-General's certificate should be accepted by the authorities of a state as proof of the facts attested therein.

In the U.S. view, the proposed certification is not necessarily one of fact, but also of legal interpretation of the scope of the

convention. As the report points out in paragraph 2, the UN is not a party to the convention, and its views are without prejudice to the views of states or the decisions of national authorities about obligations under the convention. In order not to prejudice the view of national authorities of their obligations, these authorities should be free to make determinations for the purposes of prosecution in accordance with their domestic laws and evidentiary procedures. In our view, the presence or absence of a determination by the Secretary-General should not be determinative as to whether a victim is covered under this convention.

The parties to the convention are currently free to call on the assistance of the Secretary-General to provide information relevant to their determination whether the convention is applicable if they so desire. We believe that this authority properly allows states parties to draw their own conclusions about their legal obligations. Designating the Secretary-General as a certifying authority would add another procedural layer delaying, or possibly impeding, prompt implementation of the convention.

Thirdly, the United States supports the report's recommendation to include key provisions of the 1994 Convention in the status-of-forces or status of missions agreements concluded between the United Nations and states in whose territories peacekeeping operations are deployed.

Finally, the report offers suggestions on elements of a possible protocol extending the applicability of the convention to all United Nations operations and humanitarian personnel.

While the United States is not yet a party to the Convention, the President has sent the Convention to the Senate for its advice and consent to ratification. We hope the U.S. Senate will approve ratification in the near future. The United States supports elaboration of a protocol that would extend the protections of the convention to humanitarian relief personnel present in an area of UN operation. While a U.S. position on the precise parameters of the protocol has not been determined, we can support the establishment of a working group of the Sixth Committee to consider measures to strengthen and enhance the protective regime of the convention taking into account the recommendations made by the Secretary-General in his report.

## **B. INTERNATIONAL LAW COMMISSION DRAFT ARTICLES ON STATE RESPONSIBILITY**

On March 1, 2001, the United States provided comments on the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts, excerpted below. The draft articles were adopted by the International Law Commission ("ILC") at its 53rd Session in 2001. Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10 (A/56/10), chp. IV.E., available at [http://www.un.org/law/ilc/texts/State\\_responsibility/responsibilityfra.htm](http://www.un.org/law/ilc/texts/State_responsibility/responsibilityfra.htm).

The ILC also recommended that the UN General Assembly take note of the draft Articles in a resolution and consider at a later date whether to convene an international conference with a view to concluding a convention on the topic.

The General Assembly adopted a resolution on December 12, 2001 in which it decided to include an item entitled "Responsibility of States for intentionally wrongful acts" in the provisional agenda for its 59th Session. A/RES/56/83. The text of the articles is annexed to the Resolution.

The full text of the U.S. comments is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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### **Draft Articles on State Responsibility: Comments of the Government of the United States of America March 1, 2001**

#### **Introduction and Summary**

The Government of the United States of America welcomes the opportunity to provide comments on the second reading of the draft articles on state responsibility prepared by the International Law Commission.<sup>1</sup> The Commission has made substan-

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<sup>1</sup> The text of the draft articles, provisionally adopted on the second reading by the Commission, may be found in the ILC's report on its work during its fifty-second session. *See* Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10, pp. 124–140).

tial progress in revising the draft articles; however, certain provisions continue to deviate from customary international law and state practice. The United States' comments first address those provisions that raise the most serious concerns:

- (1) *Countermeasures*: . . .
- (2) *Serious breaches of essential obligations to the international community*: . . .
- (3) *Injured states*: . . .

In addition to these areas, the United States would like to draw the Commission's attention to other provisions. . . . It is our hope that these comments will facilitate the Commission's continuing and important efforts to finalize the draft articles on state responsibility by aligning them more closely with customary international law and state practice.

## **I. Countermeasures**

Countermeasures are acts of a state that would otherwise be considered wrongful under international law, but are permitted and considered lawful to allow an injured state to bring about the compliance of a wrongdoing state with its international obligations. Article 23 defines countermeasures as those acts whose wrongfulness is precluded to the extent the act constitutes a countermeasure under the conditions set forth in Articles 50 to 55. The United States prefaces its remarks by noting that any actions by a state that are not otherwise prohibited under international law are outside the scope of Articles 23 and 50 to 55 as these actions would not, by definition, constitute countermeasures.

The United States continues to believe that the restrictions in Articles 50 to 55 that have been placed on the use of countermeasures do not reflect customary international law or state practice, and could undermine efforts by states to peacefully settle disputes. We therefore strongly believe these articles should be deleted. However, should the Commission nonetheless decide to retain them, we believe that, at a minimum, the following revisions must be made: (1) delete Article 51 which lists five obligations that are not subject to countermeasures, because this article

is unnecessary given the constraints already imposed on states by the United Nations Charter, and because the article suffers from considerable vagueness; (2) recast Article 52 on proportionality to reflect the important purpose of inducement in countermeasures; (3) revise Article 53 which sets forth conditions governing a state's resort to countermeasures to (a) either delete the requirement for suspension of countermeasures or clarify that "provisional and urgent" countermeasures need not be suspended when a dispute is submitted to a tribunal and (b) reflect that under customary international law a state may take countermeasures both prior to and during negotiations with a wrongdoing state.

#### **A. Article 51—Obligations not subject to countermeasures**

Article 51(1) lists five obligations that are not subject to countermeasures. This article is not necessary. First, the Charter of the United Nations already establishes overriding constraints on behavior by states. Second, by exempting certain measures from countermeasures, Article 51(1) implies that there is a distinction between various classes of obligations, where no such distinction is reflected under customary international law. Third, the remaining articles on countermeasures already impose constraints on the use of countermeasures. It would be anomalous to prevent a state from using a countermeasure, consistent with the other parameters provided in these articles, and in response to another state's breach, particularly where that breach involved graver consequences than those in the proposed countermeasures. Finally, Article 51(1) has the potential to complicate rather than facilitate the resolution of disputes. There is no accepted definition of the terms the article uses, inviting disagreements and conflicting expectations among states. There is no consensus, for example, as to what constitutes "fundamental human rights." In fact, no international legal instrument defines the phrase "fundamental human rights," and the concept underlying this phrase is usually referred to as "human rights and fundamental freedoms." Likewise, the content of peremptory norms in areas other than genocide, slavery and torture is not well-defined or accepted. Moreover, Article 51(1) would inhibit the ability of states, through countermeasures, to peacefully induce a state to remedy breaches

of fundamental obligations. The United States recommends deleting this article.

## **B. Article 52—Proportionality**

The United States agrees that under customary international law a rule of proportionality applies to the exercise of countermeasures, but customary international law also includes an inducement element in the contours of the rule of proportionality. As stated in our 1997 comments on the first reading text, proportionality may require, under certain circumstances, that countermeasures be related to the initial wrongdoing by the responsible state. *See State Responsibility: Comments and Observations Received from Governments*, International Law Commission, 50th Sess., at 126, U.N. Doc. A/CN.4/488 (1998) [hereinafter “Comments”]. Likewise, proportionality may also require the countermeasures be “tailored to induce the wrongdoer to meet its obligations.” *Id.* In his Third Report on State Responsibility, the Special Rapporteur addresses the question of whether it would be useful to introduce a “notion of purpose” or the inducement prong into the proportionality article. *See Third Report on State Responsibility*, International Law Commission, 52d Sess., at para. 346, p.28, U.N. Doc. A/CN.4/507/Add.3 (2000). He concludes that while it is indeed a requirement for countermeasures to be “tailored to induce the wrongdoer to meet its obligations,” this requirement is an aspect of necessity (formulated in the first meeting text draft Article 47 and second reading text draft Article 50), and not of proportionality. *Id.* The United States respectfully disagrees. The requirement of necessity deals with the initial decision to resort to countermeasures by asking whether countermeasures are necessary. *See Comments*, at 127 n. 113, U.N. Doc. A/CN.4/488 (1998). In contrast, whether the countermeasure chosen by the injured state “is necessary to induce the wrongdoing state to meet its obligations” is an aspect of proportionality. *Id.* The United States continues to believe that this aspect of proportionality should be included in Article 52.

Article 52, as revised, incorporated language from the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), 1997 I.C.J. 7, 56 (Sept. 25) [hereinafter *Gabčíkovo-*

Nagymaros]. In *Gabcikovo-Nagymaros*, the International Court noted that “the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.” *Id.* In his Third Report, the Special Rapporteur notes that, in response to the proposals of several governments that “the requirement of proportionality be more strictly formulated,” the double negative formulation of the first reading text (“[c]ountermeasures . . . shall not be out of proportion” to the internationally wrongful act) should be replaced by the positive formulation of *Gabcikovo-Nagymaros* (countermeasures should be “commensurate with the injury suffered”). See *Third Report on State Responsibility*, International Law Commission, 52d Sess., at para. 346, p. 27, U.N. Doc. A/CN.4/507/Add.3 (2000).

The International Court’s analysis does not clearly indicate what is meant by the term “commensurate,” and this term likewise is not defined in Article 52. A useful discussion of the term “commensurate” in the context of the rule of proportionality can be found in Judge Schwebel’s dissenting opinion in the *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 259 (June 27). Judge Schwebel (citing Judge Ago) notes that “[i]n the case of conduct adopted for punitive purposes . . . it is self-evident that the punitive action and the wrong should be commensurate with each other, but in the case of action taken for the specific purpose of halting and repelling an armed attack, this does not mean that the action should be more or less commensurate with the attack. Its lawfulness cannot be measured except by its capacity for achieving the desired result.” *Id.* at 368. Although Judge Schwebel’s analysis of proportionality arose in the context of collective self defense, his reasoning is equally applicable to countermeasures.

The United States is concerned that the term “commensurate” may be interpreted incorrectly to have a narrower meaning than the term “proportional.” Under such a view, a countermeasure might need to be the exact equivalent of the breaching act by the responsible state. The United States does not believe such an interpretation is in accord with international law and practice. We believe that the rule of proportionality permits acts that are tailored to induce the wrongdoing state’s compliance with its international obligations, and that therefore a countermeasure need not be the exact equivalent of the breaching act. To avoid any



ambiguity, the United States recommends that the phrase “commensurate with” in Article 52 be replaced with the traditional phrase “proportional to.”

The United States also notes that the phrase “rights in question,” taken from *Gabcikovo-Nagymaros*, is not defined by the case itself or by Article 52. While the phrase “rights in question” generally refers to the rights alleged to have been violated by the parties to a particular dispute brought before the ICJ, in *Gabcikovo-Nagymaros*, the phrase is not used to refer the rights of Hungary or Slovakia but rather is used as part of the Court’s general definition of countermeasures. The United States understands the phrase “rights in question” to preserve the notion that customary international law recognizes that a degree of response greater than the precipitating wrong may sometimes be required to bring a wrongdoing state into compliance with its obligations if the principles implicated by the antecedent breach so warrant. *See Comments*, at 127, U.N. Doc. A/CN.4/488 (1998); *see also Case Concerning the Air Services Agreement of March 27, 1946 Between the United States of America and France*, 18 R.I.A.A. 417, 443–44 (1978) [hereinafter “Air Services Case”].

Accordingly, with the changes the United States proposes, Article 52 would read “Countermeasures must be proportional to the injury suffered, taking into account both the gravity of the internationally wrongful act and the rights in question as well as the degree of response necessary to induce the State responsible for the internationally wrongful act to comply with its obligations.”

## C. Article 53—Conditions relating to resort to countermeasures

### 1. *Negotiation*

Article 53(2) requires that an injured state offer to negotiate with the breaching state prior to taking countermeasures, and Article 53(4) requires that countermeasures not be undertaken while negotiations are being pursued in good faith. These articles contravene customary international law, which permits an injured state to take countermeasures prior to seeking negotiations with the responsible state, and also permits countermeasures during negotiations. *See Air Services Case* at 444–46. The Air Services

Tribunal noted that it “does not believe that it is possible, in the present state of international relations, to lay down a rule prohibiting the use of counter-measures during negotiations. . . .” *Id.* at 445. The reason for the Air Services rule is clear: it prevents the breaching state from controlling the duration and impact caused by its breach by deciding when and for how long to engage in “good faith negotiations.” The United States believes it is essential that the Commission delete the negotiations clause from Article 53(2), and Article 53(4) in its entirety in order to bring the draft articles into conformity with customary international law.

## *2. Provisional and urgent countermeasures*

Article 53(3) creates an exception to Articles 53(2) and 53(4) for “such provisional and urgent countermeasures as may be necessary to preserve” the injured state’s rights. The United States commends the Commission’s decision to replace the language of the first reading text, which referred to “interim measures of protection” with the reference in Article 53(3) to “provisional and urgent countermeasures.” Nonetheless, several problems with this provision still remain. First, there is nothing under customary international law to support limiting the countermeasures that may be taken prior to and during negotiations only to those countermeasures that would qualify as “provisional and urgent.” The United States maintains that the negotiation clause in Article 53(2) and Article 53(4) in its entirety should be deleted. The inclusion of Article 53(3) does not satisfy these objections.

Second, it would appear that even “provisional and urgent” countermeasures would be required to be suspended under Article 53(5)(b) if the dispute “is submitted to a court or tribunal which has the authority to make decisions binding on the parties.” As discussed below, the United States strongly believes that Article 53(5)(b) should be deleted, but, at a minimum, if Article 53(5)(b) is retained, Article 53(3) needs to be exempt from the suspension requirement of Article 53(5)(b). The purpose of Article 53(3) is to enable an injured state to preserve its rights during negotiations with the responsible state. The injured state’s need for preservation of these rights does not disappear when the responsible

state submits the dispute to a court or tribunal with the authority to make binding decisions on the parties. Otherwise a breaching state could control the duration and impact of the injury it is causing through its breach.

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### 3. *Suspension of countermeasures*

Under Article 53(5)(b), once a dispute is submitted to a court or tribunal with the authority to make binding decisions, no new countermeasures may be taken, and countermeasures already taken must be suspended within a reasonable time. The United States believes that this provision needs to be deleted as there is no basis for such an absolute rule. The Air Services Tribunal noted that, once a dispute is submitted to a tribunal that has the “means to achieve the objectives justifying the countermeasures,” the right to initiate countermeasures disappears, and countermeasures already initiated “*may*” be “eliminated” but only to the extent the tribunal provides equivalent “interim measures of protection.” *Air Services Case* at 445–46 (emphasis supplied). Further, the Air Services tribunal noted that “[a]s the object and scope of the power of the tribunal to decide on interim measures of protection may be defined quite narrowly, however, the power of the parties to initiate or maintain countermeasures, too, may not disappear completely.” *Id.* at 446. This approach appropriately reflects the need to ensure that an injured party is able to respond to a continuing injury caused by another state’s breach. The United States submits that the requirement to suspend countermeasures is not so much related to a tribunal’s authority to make binding decisions on the parties, as it is to whether a tribunal actually orders equivalent “interim measures of protection” to replace the suspended countermeasures in protecting the injured state’s rights. Likewise, the right to initiate countermeasures does not disappear completely if a tribunal’s ability to impose interim measures of protection is insufficient to address the injury to the state caused by the breach. As these determinations can only be made on a case by case basis, the United States urges the Commission to delete Article 53(5)(b).

## II. Serious breaches of essential obligations to the international community

The United States welcomes the removal of the concept of “international crimes” from the draft articles. Articles 41 and 42 dealing with “serious breaches of essential obligations to the international community” have replaced the first reading text Article 19, which dealt with “international crimes.” Though the replacement of “international crimes” with the category of “serious breaches” is undoubtedly an important improvement, the United States questions the merit of drawing a distinction between “serious” and other breaches.

There are no qualitative distinctions among wrongful acts, and there are already existing international institutions and regimes to respond to violations of international obligations that the Commission would consider “serious breaches.” For example, the efforts underway to establish a permanent International Criminal Court, and the Security Council’s creation of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, are examples of special regimes of law better suited than the law of state responsibility to address serious violations of humanitarian law. Indeed, responsibility for dealing with violations of international obligations that the Commission interprets as rising to the level of “serious breaches” is better left to the Security Council rather than to the law of state responsibility. Further, the description of some breaches as “serious” derogates from the status and importance of other obligations breached. The articles on state responsibility are an inappropriate vehicle for making such distinctions. Finally, the draft articles are intended to deal only with secondary rules. Articles 41 and 42 in attempting to define “serious breaches” infringe on this distinction between primary and secondary rules, as primary rules must be referenced in order to determine what constitutes a “serious breach.”

The United States also notes that the definition of what constitutes a “serious breach” in Article 41(2) uses such broad language that any purpose of drawing a distinction between “serious” breaches and other breaches is essentially negated. Almost any breach of an international obligation could be described by an injured State as meeting the criteria for “serious breaches,” and

given the additional remedies the draft articles provide for “serious breaches,” injured states might have an incentive to argue that an ordinary breach is in fact a “serious breach.” There is little consensus under international law as to the meaning of the key phrases used to define “serious breach,” such as “fundamental interests” and “substantial harm.” This lack of consensus makes it nearly impossible for the Commission to draft a definition of “serious breach” that would be widely accepted. This difficulty in arriving at an acceptable definition of “serious breach” provides additional strong grounds for the deletion of these articles.

The most troubling aspect of the articles on “serious breaches” is that these articles provide additional remedies against states found to have committed “serious breaches,” above and beyond those provided for ordinary breaches. The United States is most concerned with Article 42(1), which includes language (“damages reflecting the gravity of the breach”) that can be interpreted to allow punitive damages for serious breaches. There is scant support under customary international law (in contrast to domestic law) for the imposition of punitive damages in response to a “serious breach,” and the United States believes it is crucial that this paragraph be deleted. The Special Rapporteur has acknowledged the lack of a basis under customary international law for the imposition of punitive damages, stating that “[t]here is no authority and very little justification for the award of punitive damages properly so-called, in cases of State responsibility, in the absence of some special regime for their imposition.” See *Third Report on State Responsibility*, International Law Commission, 52nd sess., at para. 190 and n.157, U.N. Doc. A/CN.4/507/Add.1 (2000); see also, *First Report on State Responsibility*, International Law Commission, 50th sess., at para. 63, U.N. Doc. A/CN.4/490/Add.2 (1998), listing cases that have rejected claims for punitive damages under international law.

The United States notes that detailed proposals for the consequences that should attach to responsible states committing international crimes were rejected both in 1995 and in 1996 by the Commission. See *First Report on State Responsibility*, International Law Commission, 50th Sess., at para. 51 and n.35, U.N. Doc. A/CN.4/490/Add.1 (1998). The Commission should likewise reject any attempt at this late date to introduce what appears to be a spe-

cial regime for the imposition of punitive damages into the draft articles as a potential remedy for “special breaches.” The United States strongly urges the Commission to delete Articles 41 and 42.

### III. Invocation of the state responsibility of a state

#### A. Definition of “injured state”

The United States welcomes the important distinction that the Commission has drawn between states that are specifically injured by the acts of the responsible state, and other states that do not directly sustain injury. We believe this distinction is a sound one. We also support the Commission’s decision to structure Article 43 in terms of bilateral obligations dealt with in paragraph (a) and multilateral obligations dealt with in paragraph (b). We share the view noted in the Special Rapporteur’s Third Report that Article 43(b) pertaining to multilateral obligations would not apply “in legal contexts (e.g. diplomatic protection) recognised as pertaining specifically to the relations of two States *inter se*”. See *Third Report on State Responsibility*, International Law Commission, 52nd sess., at para. 107, Table 1, U.N. Doc. A/CN.4/507 (2000). Thus, there is nothing in Article 43 that would change the doctrine of espousal.

The definition of injured state was narrowed in the revised articles, and we welcome this improvement. We believe, however, that the draft articles would benefit from an even further focusing of this definition. Article 43(b)(ii) provides that if an obligation breached is owed to a group of states or the international community as a whole and “is of such a character as to affect the enjoyment of the rights or the performance of the obligations of all the States concerned,” then a state may claim injured status. The broad language of this provision allows almost any state to claim status as an injured state, and thereby undermines the important distinction being drawn between states specifically injured and those states not directly sustaining an injury. Further, it inappropriately allows states to invoke the principles of state responsibility even when they have not been specially affected by the breach. Article 43(b)(i) provides an adequate standard for invoking state responsibility for a breach owed to

a group of states that is more in keeping with established international law and practice. The United States urges that Article 43(b)(ii) be deleted.

#### **IV. Other issues**

##### **A. Attribution of conduct carried out in absence of official authority**

Article 7 allows the conduct of private parties to be attributed to a state when private parties exercise “elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.” The commentary to first reading Article 8(b) (the predecessor to Article 7) noted that international practice in this area is very limited and thus acknowledged that there is little authority to support this article. *See* Draft Articles on State Responsibility with Commentaries Thereto Adopted by the International Law Commission on First Reading at 34 (Text Consolidated by Secretariat, January 1997, Doc. 97-02583) [hereinafter “Commentary”]. Moreover the Commentary noted that this article would apply only in exceptional circumstances, such as when organs of administration are lacking as a result of war or natural disaster. Because the persons to whom this article would apply “have no prior link to the machinery of the State or to any of the other entities entrusted under internal law with the exercise of elements of the governmental authority, the attribution of their conduct to the State is admissible only in exceptional cases.” *Id.* The United States believes Article 7 should be redrafted to more explicitly convey this exceptional nature.

##### **B. Breach consisting of composite act**

The United States commends the Commission for substantially revising and streamlining the articles concerning the moment and duration of breach. In particular, the United States notes that Article 15(1) defines breach of an international obligation as occurring in the context of “a series of actions or omissions defined in aggregate as wrongful” only when an action or omis-

sion taken with all other actions or omissions is sufficient to constitute the wrongful act. This is, for example, inherently so with regard to judicial actions. A lower court decision may be the first action in a series of actions that will ultimately be determined in the aggregate to be internationally wrongful. The lower court decision, in and of itself, may be attributable to the State pursuant to Article 4; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in Article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes the final expression of the court system as a whole, i.e. until there has been a decision of the court of last resort available in the case. The United States also wishes to note its understanding that, consistent with Article 13, the series of actions or omissions defined in aggregate as wrongful cannot include actions or omissions that occur before the existence of the obligation in question.

While the United States approves of Article 15(1), we believe that Article 15(2) requires further consideration. The current draft does not differentiate between categories of action which clearly lend themselves to consideration as composite acts, such as genocide, and other categories of action where such characterization is not so clearly appropriate under customary international law. This could result in inappropriately extending liability in certain situations.

### **C. Responsibility of a state in respect of the act of another state**

Article 16 allows a state which aids or assists another state in committing an internationally wrongful act to be held responsible for the latter state's wrongful act if the assisting state does so "with knowledge of the circumstances of the internationally wrongful act" and if the act would be internationally wrongful had it been committed by the assisting state itself. The United States welcomes the improvements in Article 16 over its first reading predecessor (Article 27), particularly the incorporation of an intent requirement in the language of Article 16(a) which requires "knowledge of the circumstances of the internationally wrongful act." The United States is also pleased to note that Article 16 is



“limited to aid or assistance in the breach of obligations by which the assisting State is itself bound.” See *Second Report on State Responsibility*, International Law Commission, 51st Sess., at para. 186, U.N. Doc. A/CN.4/498/Add.1 (1999).

The United States believes that Article 16 can be further improved by providing additional clarification in the commentary to Article 16 as to what “knowledge of the circumstances” means and what constitutes the threshold of actual participation required by the phrase “aids or assists.” We note that in both the commentary to the first reading Article 27 and in the Special Rapporteur’s discussion of this article in his Second Report, it has been stressed that the intent requirement must be narrowly construed. An assisting state must be both aware that its assistance will be used for an unlawful purpose and so intend its assistance to be used. The United States believes that Article 16 should cover only those cases where “the assistance is clearly and unequivocally connected to the subsequent wrongful act.” *Id.* at para. 178. The inclusion of the phrase “of the circumstances” as a qualifier to the term “knowledge” should not undercut this narrow interpretation of the intent requirement, and the commentary to Article 16 should make this clear.

As to the threshold of participation required by the phrase “aids or assists,” the commentary to first reading Article 27 drew a distinction between “incitement or encouragement” which Article 27 did not cover, and noted that aid or assistance must make it “materially easier for the State receiving the aid or assistance in question to commit an internationally wrongful act.” See Commentary to Article 27 at para. 17. The United States urges the Commission to fully develop the issue of what threshold of participation is required by the phrase “aids or assists” in the commentary to Article 16, as the current draft of Article 16 provides little guidance on this issue.

#### **D. Assurances and guarantees of non-repetition.**

Article 30(b) requires the state responsible for an internationally wrongful act “to offer appropriate assurances and guarantees of non-repetition, if circumstances so require.” The United States urges the deletion of this provision because it does not codify customary international law, and there is fundamental skepticism, even

among the Commission itself, as to whether there can be any legal obligation to provide assurances and guarantees of non-repetition. *See* Official Records of the General Assembly, Fifty-fifth Session, Supplement No. 10 (A/55/10 p. 29, para. 88). There are no examples of cases in which courts have ordered that a state give assurances and guarantees of non-repetition. *Id.* With regard to state practice, assurances and guarantees of non-repetition appear to be “directly inherited from nineteenth-century diplomacy,” and while governments may provide such assurances in diplomatic practice, it is questionable whether such political commitments can be regarded as legal requirements. *Id.* In fact, use of the term “appropriate” to modify “assurances and guarantees” is a further indication that Article 30(b) does not reflect a legal rule, but rather a diplomatic practice. Finally, even the Third Report raises the question as to whether assurances and guarantees can properly be formulated as obligations. *See Third Report on State Responsibility*, International Law Commission, 52nd Sess., at para. 58, U.N. Doc. A/CN.4/507 (2000). The United States submits that assurances and guarantees of non-repetition cannot be formulated as legal obligations, have no place in the draft articles on state responsibility, and should remain as an aspect of diplomatic practice. The United States also notes that under Article 49(2)(a) states other than injured states may seek from the responsible state assurances and guarantees of non-repetition in addition to cessation of the internationally wrongful act. For the reasons expressed above with respect to Article 30(b), the United States believes that the “assurances and guarantees of non-repetition” provision of Article 49(2)(a) should likewise be deleted.

#### E. Moral damages

The United States welcomes the Commission’s removal of moral damages from Article 38 concerning satisfaction. The United States notes that moral damages are encompassed by a responsible state’s duty to make full reparation under Article 31(2) which provides that “injury consists of any damage, whether material or moral.” The United States urges the Commission to make explicit that moral damages are likewise included in a responsible state’s duty to provide compensation for damage to injured states by clarifying in Article 37(2) that moral damages are “finan-

cially assessable damage[s]”. The United States also believes it would be important to clarify in this article that moral damages are limited to damages for mental pain and anguish and do not include “punitive damages.”

#### **F. Exhaustion of local remedies**

Article 45 addresses the admissibility of claims and provides that state responsibility may not be invoked if (a) a claim is not brought in accordance with applicable rules relating to nationality of claims and (b) the claim is “one to which the rule of exhaustion of local remedies applies, and any available and effective local remedy has not been exhausted.” The Special Rapporteur’s comments to this provision make clear that exhaustion of local remedies is “a standard procedural condition to the admissibility of the claim” rather than a substantive requirement. *See Second Report on State Responsibility*, International Law Commission, 51st Sess., at para. 143, U.N. Doc. A/CN.4/498 (1999). The United States welcomes this clarification by the Special Rapporteur, and further notes that the precise parameters of this procedural rule should be dealt with in detail under the topic of Diplomatic Protection. *See Third Report on State Responsibility*, International Law Commission, 52nd Sess., at para. 241, U.N. Doc. A/CN.4/507/Add.2 (2000).

#### **G. Joint and several liability**

The United States is concerned that Article 48, which deals with invocation of responsibility against several states, could be interpreted to allow joint and several liability. Under common law, persons who are jointly and severally liable may each be held responsible for the entire amount of damage caused to third parties. As noted by the Special Rapporteur in his Third Report, states should be free to incorporate joint and several liability into their specific agreements, but apart from such agreements, which are *lex specialis*, states should only be held liable to the extent the degree of injury suffered by a wronged state can be attributed to the conduct of the breaching state. *See Third Report on State Responsibility*, International Law Commission, 52nd Sess., at

para. 277, U.N. Doc. A/CN.4/507/Add. 2 (2000). To clarify that Article 48 does not impose joint and several liability on states, the United States proposes that Article 48(1) be redrafted to read as follows: “Where several States are responsible for the same internationally wrongful act, the responsibility of each State may only be invoked to the extent that injuries are properly attributable to that State’s conduct.”

## **H. Final Form**

The United States believes that the draft articles on state responsibility should not be finalized in the form of a Convention. Because the draft articles reflect secondary rules of international law, a Convention is not necessary, as it might be with respect to an instrument establishing primary rules. Additionally, finalizing the draft articles in a form other than a Convention would facilitate the Commission’s efforts to complete its work and avoid contentious areas, such as the dispute settlement provisions currently omitted from the second reading text. Such an approach would make the draft articles amenable to wider agreement during negotiation.

## **Conclusion**

The United States is pleased with the substantial progress the Commission has made in revising the draft articles to more accurately reflect existing customary international law. However, we believe that the particular provisions we have discussed continue to deviate from customary international law and state practice. In order to enhance prospects for broadest support of the Commission’s work in this important area, we believe it critical that the Commission better align the provisions with customary international law in the areas discussed above.

## CHAPTER 8

# International Claims and State Responsibility

### A. GOVERNMENT-TO-GOVERNMENT CLAIMS

#### 1. Iran-U.S. Claims Tribunal

On November 4, 1979, Iranian militants seized the American Embassy in Tehran, Iran, and took as hostages more than 50 U.S. diplomatic and military personnel who were stationed there. On January 19, 1981, the United States and Iran entered into an international executive agreement with Iran embodied in two declarations of the Government of Algeria, known as the Algiers Accords. Declaration of the Government of the Democratic and Popular Republic of Algeria (“General Declaration”) and Declaration of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran (“Claims Settlement Declaration”), 20 I.L.M. 223 (1981).

The Algiers Accords brought about the release of the American hostages and established the Iran-U.S. Claims Tribunal to resolve existing disputes between the two countries and their nationals. Under the Accords, the United States released the vast majority of Iran’s “frozen” assets and transferred them directly to Iran or to various accounts to pay outstanding claims. Almost all of the approximately 4,700 private U.S. claims filed against the Government of Iran at the Tribunal have been resolved and have resulted in more than \$2.5 billion in awards to U.S. nationals and companies. The two governments have also filed claims against

each other. Most of these inter-governmental claims were filed by Iran against the United States. While some parts of those claims have been resolved, a number of major cases remain to be adjudicated at the Tribunal. The Tribunal sits in The Hague, The Netherlands and is comprised of nine arbitrators: three appointed by Iran, three by the United States, and three by the party-appointed members acting jointly or, in absence of agreement, by an Appointing Authority. The Appointing Authority is named by the parties or, if the parties cannot agree, may be designated by the Secretary General of the Permanent Court of Arbitration if the parties so request. Challenges to Tribunal members are decided by the Appointing Authority as provided in Article 12 of the Tribunal Rules.

On January 4, 2001, the United States filed a challenge of Mr. Bengt Broms, member and Chairman of Chamber One of the Iran-United States Claims Tribunal. As explained in its letter to the Appointing Authority, the United States had had doubts as to the arbitrator's impartiality and independence for many years. The United States explained that these doubts had been confirmed by a Concurring and Dissenting Opinion filed by Mr. Broms in Case No. A/28, December 19, 2000, in which he . . .

discloses the confidential deliberations of the Tribunal in a sustained effort to undercut the legitimacy of those portions of the Tribunal's ruling favorable to the United States, demonstrates his favorable disposition towards Iran, and strips those arbitrators who had voted in favor of the United States [of] the protections and respect accorded by the requirement of confidentiality of deliberations [set forth in Article 31, Note 2 of the Tribunal Rules]. Mr. Broms's opinion also expressly records his rejection of the fundamental principle and requirement enshrined in Article 33 of the Tribunal's Rules and Article V of the Settlement Declaration—at least insofar as it applies to the United States—that all cases be decided on the basis of the law rather than an individual arbitrator's subjective perception of fairness. Moreover, in his opinion, Mr. Broms impermissibly encourages Iran not to comply with the

relief provisions of the Decision rendered by the Tribunal in Case No. A/28, provisions of great significance and benefit to the United States. Finally, in the course of his opinion, Mr. Brooms pre-judges the merits of key questions at issue in the United States' counterclaim in Case No. B/1 before the Tribunal. These circumstances give rise to justifiable doubts as to Mr. Brooms's impartiality and independence, constitute a failure to act and render it *de facto* impossible for him to perform his functions as an arbitrator.

The United States requested that the Appointing Authority decide and sustain the challenge "in the event that the Government of Iran does not expeditiously agree to the challenge, or that Mr. Brooms does not quickly withdraw voluntarily." Responses to the challenge were filed by Iran and Mr. Brooms on February 15 and 22, 2001, respectively, followed by a further round of submissions in March and April.

In a Decision of May 7, 2001, the Appointing Authority found that Mr. Brooms had breached the requirement of confidentiality of deliberations but that the breach had been adequately addressed through a Statement of the President on December 21, 2000. The Appointing Authority found the allegations of the United States as to Judge Brooms's independence and impartiality unjustified and dismissed the United States challenges. The excerpt below from the United States Memorandum in Support of its Challenge described the legal basis for the challenge.

The full texts of the United States submissions of January 4 and March 10, 2001 are available at [www.state.gov/s/l](http://www.state.gov/s/l).

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Under Article 10 of the Tribunal's Rules, an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence." In addition, Article 13(2) of the Rules provides that "in the event an arbitrator fails to act or in the event of *de jure* or *de facto* impossibility of performing his functions," the procedures for challenge and replacement of arbitrators set forth in the Rules apply. Mr. Brooms's conduct justifies a challenge on both grounds.

Article 10 of the Rules enshrines the fundamental obligation of an arbitrator to be impartial in the adjudication of issues before him. The challenge must be based on circumstances which give rise to justifiable doubts about that Arbitrator's impartiality and independence. *See* Decision of Appointing Authority of 19 September 1989, 21 Iran-U.S. C.T.R. 384, 387. Complaints alleging infringement or misapplication of the rules of procedure can succeed only if the alleged infringement or misapplication justifies doubts about the impartiality or independence of the arbitrator concerned. *Id.* The infringement or misapplication of the rules must admit no other explanation, such as error or misunderstanding, than a lack of impartiality or independence. *Id.* These criteria are met . . . in the case of Mr. Broms.

Article 13(2) of the Rules is intended to cover not only situations of physical incapacity due to illness but "other circumstances" that result in an arbitrator's failure to act or impossibility of performing his duties. *See* Article 13, Note 1, of the Tribunal Rules. As the Committee Report on the UNCITRAL Arbitration Rules makes clear, Article 13(2) was drafted to cover all circumstances that make it impossible for an arbitrator to perform his functions. *See* Report of Committee II, 9th Sess. para. 70 (A/CN.9/IX/CRP.1). This broader scope of Article 13(2) was elaborated by the Appointing Authority in his Decision of 24 September 1991, where he stated:

Taking into account the purpose of . . . [Article 13(2) of the Tribunal Rules]—to safeguard the regular progress of the adjudicatory process—it is reasonable to assume that the phrase "fails to act" also covers the situation in which an arbitrator, though not completely inactive, consciously neglects his arbitral duties in such a way that his overall conduct falls clearly below the standard of what may be reasonable [sic] expected from an arbitrator.

27 Iran-U.S. C.T.R. 328, 332. Mr. Broms' conduct, as demonstrated below, likewise readily meets these criteria.

The Tribunal's Rules governing challenges exist to safeguard against unfairness and injustice, to maintain the integrity of the Tribunal and to ensure that the arbitration process is not frustrated or tainted by arbitrators who are partial or are unwilling



to perform, or incapable of performing, their functions. For a standing tribunal such as the Iran-U.S. Claims Tribunal, these purposes can be served only if the challenged conduct is assessed in light of its likely effect on the tribunal as a viable, continuing institution. Viewed in this light, the Government of the United States believes that the conduct of Mr. Broms recounted here requires that this challenge be sustained and that he be removed from the Tribunal.

## 2. Espousal of Claims

On July 31, 2001, the Ninth Circuit Court of Appeals affirmed dismissal of actions concerning requests for assistance of the United States Secretary of State in regaining property confiscated by the government of Czechoslovakia. *Chytil v. Powell*, 15 Fed.Appx. 515 (9th Cir. 2001) and *Marik v. Powell*, 15 Fed.Appx. 517 (9th Cir. 2001). In both cases the Secretary of State had refused to espouse the plaintiffs' claims because they had not been citizens of the United States at the time the property was confiscated. Both plaintiffs became naturalized citizens at a later date. Marik and Chytil each sought judicial review of the Secretary's refusal, seeking a declaratory judgment "directing that . . . [the] Secretary of State may not discriminate against . . . [him] on the basis of his national origin in deciding whether to take jurisdiction and to espouse his claims for restitution of property wrongfully and illegally converted and held by The Czech Republic." The U.S. District Court for the Central District of California had dismissed both cases in unpublished opinions on December 6, 1999, holding that the cases presented a political question not subject to judicial review.

The excerpt below from the opinion in *Chytil* provides the views of the Ninth Circuit Court of Appeals on the basis for espousal and the conclusion that this case presents a nonjusticiable political question. 15 Fed. Appx. at 516–517.

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Because in espousing a claim a sovereign takes the claim on as its own, a sovereign cannot espouse claims for people who were not

citizens of that sovereign at the time the injury was inflicted. *Dayton v. Czechoslovak Socialist Republic*, 834 F.2d 203, 206–07 (D.C. Cir. 1987) (quoting Letter from Richard Fairbanks, Assistant Secretary of State for Congressional Relations, Oct 2, 1981). In the United States, espousal is and historically has been the province of the executive branch of the federal government. Restatement (Third) of Foreign Relations Law § 902 cmt.1 (1986) (“In the United States, the presentation of claims against foreign governments, including those on behalf of private persons, is the responsibility of the President and the Executive Branch.”).

The political question doctrine, first recognized in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 164 (1803), stands for the tenet that “certain political questions are by their nature committed to the political branches to the exclusion of the judiciary.” *Antolok v. United States*, 873 F.2d 369, 379 (D.C. Cir. 1989). Like many—though not all—other foreign relations issues, espousal is by its nature within the province of the executive branch. See *id.* at 380; *Baker v. Carr*, 369 U.S. 186, 211 (1962). Espousal seems particularly unsuited to resolution in the judicial branch. In making espousal decisions, the Secretary of State undoubtedly takes into account many factors relating to foreign relations, including the relations between the United States and the foreign country against which a person has a claim. The judiciary has no experience in espousal and has no way of considering the many other factors that espousal decisions would affect, and there is no basis upon which the judiciary can conclude that national origin is a factor that the Secretary may not consider. We therefore hold that Chytil’s case presents a nonjusticiable political question.

## **B. CLAIMS OF INDIVIDUALS**

### **1. Claims by Victims of the Nazi Era and Victims’ Heirs**

#### ***a. Claims against German companies arising from Nazi era***

On July 17, 2000, a Joint Statement was signed by lawyers representing victims of the Nazi era; representatives of German companies; the governments of Germany, the United States, the State of Israel, Belarus, the Czech Republic,

Poland, Russia and Ukraine; and the Conference on Jewish Material Claims Against Germany. The document records agreement that the German Government and companies would establish a Foundation, "Remembrance, Responsibility and the Future," ("Foundation") and capitalize it with DM 10 billion, to make payments to forced laborers and others who suffered at the hands of German companies during the Nazi era and World War II. The plaintiffs, in exchange, would voluntarily dismiss their lawsuits against German companies asserting such claims. Payments from the Foundation would begin only after all lawsuits against German companies arising out of the National Socialist era and World War II, pending in U.S. courts, were dismissed with prejudice by the courts. On the same day, Germany and the United States entered into an executive agreement in which Germany agreed to ensure that the Foundation be established and operate according to the principles enumerated in the agreement, and the United States committed to take certain steps to assist German companies in achieving "legal peace" in the United States for claims arising out of the Nazi era and World War II. (*See also Digest 2000*, Chapter 8.B.1.b.)

As the result of a "motion for centralization," pursuant to 28 U.S.C. § 1407, brought before the Judicial Panel on Multidistrict Litigation ("MDL Panel"), Nazi era lawsuits against German companies pending in the United States were consolidated before three judges. (MDL Transfer Order, Docket No. 1337 (August 4, 2000)). In the overwhelming majority of the consolidated cases, plaintiffs sought voluntary dismissal with prejudice. Judge Bassler granted the voluntary dismissal of the forced/slave labor cases, which had been assigned to him. *In re: Nazi Era Cases Against German Defendants Litigation*, 198 F.R.D. 429 (D.N.J. 2000), *see also Frumkin v. JA Jones, Inc. (In re Nazi Era Cases against German Defendants Litigation)*, 129 F.Supp. 2d 370 (D.N.J. 2001). Judge Mukasey also granted a motion for voluntary dismissal of the insurance-related cases before him. *See, e.g., Winters v. Assicurazioni Generali, S.p.a.*, 98 Civ. 9186 (S.D.N.Y.) (2000 U.S. Dist. LEXIS 18193) and *Cornell v. Assicurazioni Generali, S.p.a., Consolidated*, 97 Civ. 2262 (S.D.N.Y. 2000) (2000 U.S. Dist. LEXIS 1191) (Feb. 2, 2002).

As to the bank-related lawsuits, however, Judge Kram, of the Southern District of New York, denied plaintiffs' motion for voluntary dismissal. 2001 U.S. Dist. LEXIS 2311 (March 7, 2001). In denying the motion, contrary to the recommendation of the Special Master in the case, the Order cited three reasons. First, the Foundation had not been fully funded. Second, the absent members of the putative class, in any future effort to pursue their claims, would be faced with a Statement of Interest from the United States to which, the court reasoned, other courts would be likely to defer. Third, dismissal would prejudice a subclass of plaintiffs comprising absent putative class members who had sued Austrian banks and settled their claims in part by receiving an assignment of those banks' claims against German banks for misappropriation of Austrian bank assets during World War II (the "Assigned Claims").

Subsequent to the district court's order denying voluntary dismissal, the principal companies involved in the German Foundation entered into a binding agreement, similar to a letter of credit, that guaranteed full funding of the German industry's contribution to the Foundation. In an order dated March 20, 2001, the court denied a motion for reconsideration, however. The court remained concerned by the prejudice it envisioned with respect to the holders of the Assigned Claims because of the likelihood that they would be dismissed in the face of Statements of Interest that would be filed by the United States.

Both plaintiffs and defendant German banks then petitioned the Second Circuit for mandamus relief. The United States participated as *amicus curiae*. In its brief of March 30, 2001 excerpted below, the United States argued that the lower court's refusal to dismiss was premised on legal error and contrary to the interests of plaintiffs, Holocaust survivors around the world, and the foreign policy interests of the United States.

The full text of the brief is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

The gravity of the stakes at issue cannot easily be overstated. Holocaust survivors are aging. Many live in poverty. In lengthy and difficult negotiations, the United States determined that it would be preferable to establish a mechanism for distributing some measure of compensation now, rather than that substantial additional time and money be expended in a (likely futile) effort to achieve absolute justice for each potential claimant through litigation. The Foundation Agreement does not provide an independent basis for dismissing claims against German corporations. But the strong policy reflected in the Agreement demands that a district court, faced with a voluntary motion to dismiss such claims, should promptly grant plaintiffs' wishes absent extraordinary circumstances.

No extraordinary circumstances obtain here. As the district court itself acknowledged, its proper role in reviewing a voluntarily dismissal of an uncertified class action is very narrow. Where no prejudice will result to absent members of the putative class, such a motion should be granted. And even where prejudice might exist, a court cannot require named plaintiffs to maintain litigation. At most, a court may order notice to absent class members who might have relied on the filing of a class action.

Pursuant to the court's order, such notice was provided. The court's continued refusal to permit plaintiffs to dismiss their claims was unfounded. The court's error is highlighted because no prejudice at all will result from dismissal of the uncertified class action complaints. The district court was concerned that in future litigation that might be brought by absent class members, the United States would file a Statement of Interest as it has in this litigation. But filing of a Statement will be no greater or less an obstacle in future litigation than in the present case. And if, as the district court suggested, other judges would be derelict in failing to dismiss, the same would clearly be true here.

The court's concern that dismissal would prejudice the litigation of claims assigned by Austrian banks as part of a class action settlement is without apparent basis. Citing potential conflicts between plaintiffs pursuing original claims and plaintiffs pursuing assigned claims, the district court itself appointed separate counsel who has filed a new class action on the assigned Austrian claims. That litigation would not be dismissed even if

the appellants' motions were granted. Moreover, two of the plaintiffs who were certified as representatives of the Austrian class, the only plaintiffs in the consolidated cases below who raise only assigned Austrian claims, have not sought to dismiss their claims. Thus, the class action on the assigned Austrian claims will remain pending in the court below.

The district court, seeking to protect the interests of absent persons, has unintentionally put them in jeopardy. The effect of its order will likely be to delay Foundation payments to Holocaust survivors worldwide. This Court should promptly reverse.

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A new motion for reconsideration filed May 8, 2001, was supported by declarations from one plaintiff's attorney, Michael D. Hausfeld, who was also counsel to certain Central and Eastern European countries' members of the German Foundation's governing board. The declarations stated that those representatives would, among other things, urge the Foundation to take steps specifically to resolve concerns related to the Austrian Assigned Claims.

On May 11, 2001, prior to the scheduled May 15, 2001, oral argument, the district court, relying on the assumptions set forth in one of Hausfeld's declarations, issued a written order dismissing the cases. The Order provided, in pertinent part, as follows:

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\* \* \* \*

4. . . . [p]laintiffs' dismissal of their claims with prejudice is based on their understanding that: . . . 4(b) the Court's Order granting plaintiffs' motions for voluntary dismissal of the Consolidated Complaint will remove all material obstacles preventing the German Bundestag from making a finding of final "legal peace" so that the German Foundation monies can be authorized to be paid to claimants by the close of the present session of the Bundestag. . . ."

\* \* \* \*

7. In renewing their motion to voluntarily dismiss the Consolidated Complaint, plaintiffs rely on the assumptions as set forth

above, in the Hausfeld Declaration, and at the Hearing. If any of the assumptions on which this renewed motion is made are not realized or prove to be untrue, plaintiffs have represented that they will file motions, pursuant to *Federal Rule of Civil Procedure 60(b)*, to vacate the orders granting motions for voluntary dismissal, in this case and in related actions involving slave labor and insurance claims. Plaintiffs may also move, pursuant to *Federal Rule of Civil Procedure 60(b)*, to vacate this Order in the event the eligibility criteria of the German Foundation and/or Austrian Foundation are not revised as contemplated in the Hausfeld Declaration. . . .

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The Order further stated that “[a]ll claims against all German defendants in the above-captioned actions are dismissed with prejudice as to all plaintiffs who have previously moved to voluntarily dismiss the Consolidated Complaint. . . .”

Despite the May 11 Order’s dismissal of all claims asserted by plaintiffs-petitioners, all petitioners contended that their mandamus petitions were not moot, arguing principally that paragraphs 4(b) and 7 of the May 11 Order exceeded the authority of the district court. The U.S. Court of Appeals for the Second Circuit agreed. On May 17, 2001, it granted the writ of mandamus ordering the district court to “allow the voluntary dismissal of plaintiffs-petitioners’ claims with prejudice and to omit the imposition of conditions on foreign governments.” *In re Austrian and German Holocaust Litigation*, 250 F.3d 156 (2d Cir. 2001). In its per curiam opinion, the court explained its decision as follows:

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Under Article III of the Constitution of the United States, the province of the Judicial Branch of the federal government is the adjudication of the rights of the parties to cases or controversies under the applicable laws. The conduct of foreign relations is committed largely to the Executive Branch, with power in the Legislative Branch to, *inter alia*, ratify treaties with foreign sovereigns. The doctrine of separation of powers prohibits the federal courts from excursions into areas committed to the Executive Branch or the Legislative Branch. Given that separation of pow-

ers, “the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been ‘constitutional[ly] commit[ted]’.” . . . It is thus beyond the authority of the courts to interfere with the Executive Branch’s foreign policy judgments. . . .

In light of these constraints, we have considerable difficulty with the two portions of the May 11 Order that are challenged by petitioners, to wit, part (b) of paragraph 4, and all of paragraph 7. As quoted above, paragraph 4(b) expresses an understanding that the Order “will remove all material obstacles preventing the German Bundestag from making a finding of final ‘legal peace’ so that the German Foundation monies can be authorized to be paid to claimants by the close of the present session of the Bundestag.” Order page 4, ¶ 4(b). Paragraph 4(b) seemingly requires the German legislature to make a finding of legal peace and to do so before its summer recess. It would be beyond the authority of the court so to trammel on the prerogatives of a legislature in the United States. Much less does the court have the power to require such actions of the legislature of a foreign sovereign.

*Id.*, at 163.<sup>1</sup>

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<sup>1</sup> On October 19, 2001, the U.S. District Court for the Eastern District of New York issued a Preliminary Memorandum and Preliminary Order denying a request for an order to show cause and for a temporary restraining order in *Ukrainian National Ass’n of Jewish Former Prisoners of Concentration Camps & Ghettos v. United States, as amended*, 182 F. Supp. 2d 305 (E.D.N.Y. 2001). Plaintiffs in that case alleged that the German Foundation was depriving the plaintiffs and others of their rightful compensation and that the United States had guaranteed that the Foundation would be properly administered. In dismissing the request, the court noted that

[t]he case arguably will be controlled by *Austrian and German Holocaust Litigation v. United States District Court for the Southern District of New York*, 250 F.3d 156 (2d Cir. 2001) (Holocaust case). That opinion determined that the Foundation, Germany, and German entities had “bought peace” as certified by a final judgement dismissing class actions, and that the trial court could not invite an attack on that judgement by way of a Rule 60(b) Federal Rules of Civil Procedure motion. No review of



Judge Kram dismissed the claims the following day in an unpublished opinion. *In re Austrian and German Holocaust Litigation*, No. 98 Civ. 3938 (SWK) (May 18, 2001). The Department of State issued a press statement welcoming the court's decision and expressing its hope that the decision "paves the way for Chancellor Schroeder to recommend and the German Bundestag to determine that adequate legal peace has been achieved. As soon as the Bundestag is able to consider and adopt such a determination, the process of making payments can commence." (Available at [www.state.gov/r/pa/prs/ps/2001/2953.htm](http://www.state.gov/r/pa/prs/ps/2001/2953.htm).)

By May 21, 2001, all actions in United States District Courts had been dismissed. On May 30, 2001, the German legislature, with the agreement of German companies, determined that "adequate legal peace" had been achieved. That day, the Department of State issued a press statement welcoming this determination and stating that "President Bush congratulates the German Government and German business for their responsible actions in setting up the foundation, and applauds Chancellor Schroeder for his leadership on this issue, ensuring some measure of justice for these victims." (Available at [www.whitehouse.gov/news/releases/2001/05/20010530-6.html](http://www.whitehouse.gov/news/releases/2001/05/20010530-6.html).) In early June 2001, the Foundation began to operate and started making payments to victims.

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Foundation activity by an American court has been authorized by Germany or by the United States. Plaintiffs contend that the Foundation's prejudicial conduct can be challenged by enforcing a guarantee undertaken by the United States.

The court of appeals decision in the Holocaust case appears to imply that a guarantee, if there was one, was provided by the United States in connection with the conduct of our government's and Germany's foreign relations. The court of appeals rejected attempts by the district court to require protections for beneficiaries of the Foundation; it found these interventions an impingement on political and international aspects of United States policy. Plaintiffs then sought an order preventing the United States from filing a statement of interest urging dismissal of related cases. The case was dismissed, the court holding that it had no power to prohibit the government from acting in other litigation. 178 F. Supp. 2d 312 (E.D.N.Y. 2001).

***b. Claims against Austria and Austrian companies arising from Nazi era***

A similar process was undertaken to resolve Nazi era claims against Austria and Austrian companies. (*See also Digest 2000, Chapter 8.B.1.c.*) On October 24, 2000, the United States, Austria, six Central and Eastern European Governments, and representatives of the victims and Austrian companies signed a Joint Statement in Vienna. In it, Austria committed to establish the Austrian Fund "Reconciliation, Peace and Cooperation" ("Reconciliation Fund") to provide payments to forced and slave laborers who worked on the territory of present day Austria during the Nazi era. The fund was to be endowed with six billion Austrian schillings (\$415 million). In the Joint Statement, the victims' lawyers agreed to seek dismissal of all pending forced/slave labor cases against Austria or Austrian companies. Like the German fund, transfer of funds to the Reconciliation Fund was contingent on all pending claims as of October 24, 2000 for claims covered by the Reconciliation Fund being dismissed with prejudice and an executive agreement between the United States and Austria entering into force.

An "Agreement between the Government of the United States of America and the Austrian Federal Government concerning the Austrian Fund 'Reconciliation, Peace and Cooperation'" was signed the same day. It entered into force pursuant to an exchange of diplomatic notes on December 1, 2000. The terms of the Agreement were similar but not identical to the U.S.-German Agreement.

Following the agreement to establish the Reconciliation Fund, negotiations continued toward the establishment of a similar fund for Holocaust victims with claims against Austria and/or Austrian companies concerning the aryanization, theft, or destruction of property during the same time period. On January 17, 2001, the United States, Austria and representatives of Austrian companies and the victims signed a Joint Statement in Washington, D.C. concluding the negotiations and expressing their support for the establishment of the Austrian General Settlement Fund ("GSF") as the exclusive remedy for all claims against Austria and/or

Austrian companies arising out of or relating to the national Socialist Era or World War II (except claims for *in rem* restitution of works of art and claims covered by the Reconciliation Fund). Austria and Austrian companies agreed to contribute \$210 million (plus interest accruing over a 2-year period) to fund the GSF and plaintiffs agreed to voluntarily dismiss all such claims filed in U.S. courts.

On January 23, 2001, the United States and Austria exchanged diplomatic notes, constituting an executive agreement ("January 23 Agreement"), in which the United States welcomed Austria's commitment to, among other things, propose legislation establishing the GSF (including a Claims Committee and an *in rem* Arbitration Panel) and to amend various social benefits laws. The U.S. also stated that the GSF, once established, would constitute a "suitable potential remedy" under the October 24, 2000 agreement for claims covered by the GSF, thus obligating the U.S. to take certain steps to assist Austria and Austrian companies in achieving "legal peace" in the United States with respect to the covered Nazi-era claims against Austria and/or Austrian companies. The law creating the GSF was promulgated and entered into effect in Austria on June 6, 2001. Federal Law on the Establishment of a General Settlement Fund for Victims of National Socialism and on Restitution Measures and an Amendment to the General Social Security law and the Victims Assistance Act ("GSF Law"). On the same date, Austria notified the United States by diplomatic note that it had fulfilled the obligations necessary to bring the agreement of January 23, 2001 into force.

With the establishment of both the Restitution Fund and the GSF, the United States is obligated, under the terms of the October 24, 2000 Agreement, to advise U.S. courts through a Statement of Interest of its foreign policy interests in the two Funds being treated as the exclusive remedies for all Nazi era claims against Austria or Austrian companies (except those involving *in rem* restitution of art works) and in pending litigation involving such claims being dismissed. The United States is also obligated to take appropriate steps to oppose any challenge to the sovereign immunity of Austria with respect to such claims.

In July 2001 the last of the labor suits against Austria/Austrian companies were dismissed and payments from the Reconciliation Fund commenced shortly thereafter. Slave and forced labor claims were dismissed in unpublished opinions in *Whiteman v. Austria*, Civil Action No. 00-8006 (S.D.N.Y., July 31, 2001) and *Kluge v. Raiffeisen Zentral*, Civil Action No. 00-2851 (S.D.N.Y., July 25, 2001).

At the end of 2001 two suits asserting claims covered by the January 23 Agreement were pending. In October 2001, the United States filed a Statement of Interest in *Anderman v. Austria*, Civ.A.No. 01-01769-FMC (Aljx), a class action consisting of Nazi-era property/aryanization claims against Austria and Austrian companies. Because dismissal of the pending claims was a precondition to allowing the GSF to make payments to victims, defendants sought to expedite dismissal of the claims.

The excerpts from the Statement of Interest below set forth the interests of the United States in dismissal of the claims and support the immunity of the Republic of Austria from U.S. court jurisdiction in this case. (In addition to these topics, the brief also addresses plaintiffs' arguments attempting to establish a *jus cogens* implied waiver to FSIA and US practice in foreign sovereign immunity prior to enactment of the FSIA in a manner substantially similar to the excerpts from *Hwang Geum Joo v. Japan*, Chapter 10.A.2. below.)<sup>2</sup>

The full text of the Statement of Interest, as well as the Declaration of Stuart E. Eizenstat, Deputy Secretary of the Treasury, and the Statement of Secretary of State Madeleine K. Albright are available at [www.state.gov/s/l](http://www.state.gov/s/l).

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<sup>2</sup> The United States also filed a Statement of Interest addressing many of the same issues in the District Court of the Southern District of New York in *Whiteman v. Austria*, Civil Action No. 00-8006(SWK) in October 2001. Although the forced and slave labor claims were voluntarily dismissed in July, 2001, at the end of 2001 the Nazi-era property/aryanization claims were still pending in that case.

## BACKGROUND

\* \* \* \*

The role played by the United States in this negotiation, like the role it played in the negotiation leading to the creation of the Reconciliation Fund, the German Foundation, and the fund established to provide payments for those who suffered losses at the hands of French banks during World War II (“French Bank Fund”), was unique. . . . The agreement negotiated is not a government-to-government claims settlement agreement, and the United States has not extinguished the claims of its nationals or anyone else. . . . Instead, the intent of the United States’ participation was to bring together the victims’ constituencies on one side and the Austrian Federal Government and Austrian companies on the other, to bring a measure of expeditious justice to the widest possible population of survivors and heirs, and to help facilitate legal peace with respect to Nazi-era property/aryanization claims against Austria and/or Austrian companies, and any other claims not covered by the Reconciliation Fund, excluding claims for *in rem* restitution for works of art. . . .

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## DISCUSSION

### 1. Dismissal of the Claims in this Action Would be in the United States’ Foreign Policy Interests.

It is in the foreign policy interests of the United States for the GSF to be the exclusive forum and remedy for the resolution of all claims asserted against Austria and/or Austrian companies arising out of or relating to the National Socialist era or World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by the Reconciliation Fund. Eizenstat Decl. ¶¶ 4, 15, 29, 38. Accordingly, the United States Government believes that all claims against Austria and/or Austrian companies arising out of or related to the National Socialist Era and World War II, excluding claims for *in rem* restitution of works of art, and further excluding claims covered by

the Reconciliation Fund, should be pursued through the GSF instead of the courts. *Id.*; Statement of Secretary of State Madeleine K. Albright (“Albright Statement”) ¶¶ 2, 10. . . . The United States’ interests in supporting the GSF are explained below.

First, it is an important policy objective of the United States to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes. Albright Statement ¶ 4; Eizenstat Decl. ¶ 30. As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation.

The GSF, like the Reconciliation Fund, the German Foundation, and the French Bank Fund, is an excellent example of how such cooperation can lead to a positive result. *Id.* ¶ 31. The GSF will provide benefits to more victims, and will do so faster and with less uncertainty than would litigation, with its attendant delays and legal hurdles. *Id.* The GSF will employ standards of proof that are more relaxed than would be the case with litigation in U.S. courts. *Id.* Litigation, even if successful, moreover, could only benefit claimants subject to the jurisdiction of U.S. courts. *Id.* By contrast, the GSF will benefit all those with Nazi-era property/aryanization claims—against existing and defunct companies, against private and public companies, and against S.S.-controlled companies—as well as those with claims not covered by the Reconciliation Fund. *Id.* Indeed, as a result of the inclusion in the GSF not only of claims against Austrian companies that existed during the Nazi era, but also of claims against the Austrian Federal Government and Austrian companies that did not exist during the Nazi era, the GSF will be able to comprehensively cover all Nazi-era property/aryanization claims against Austria and/or Austrian companies, and all other claims not covered by the Reconciliation Fund. *Id.*

There was broad consensus among the participants in the negotiations concerning the level of the GSF’s funding, eligibility criteria, payment system, and the allocation of its funding among various categories of claims. *Id.* ¶ 32. Although it is true that no amount of money could truly compensate plaintiffs for the wrongs done to them, the payments they will receive through the GSF, and through the enhanced social benefits the Austrian Federal Government has committed to provide, will serve as a recognition of their suffering and will enable them to live with less dif-

ficulty than would be the case without the payments. *Id.* Creation of the GSF will also directly benefit the heirs of victims who did not survive by ensuring the eligibility of such heirs to bring claims to the GSF on the same basis as survivors. *Id.*

The United States, together with the overwhelming majority of participating lawyers for the victims and other parties to the negotiations, therefore believes that the GSF is fair under all the circumstances. *Id.* ¶ 33. The creation of the GSF, like the creation of the Reconciliation Fund, the German Foundation, and the French Bank Fund, the United States hopes, will serve as an example to other nations and in other cases where resolution of claims by victims of the Nazi era for restitution and compensation has not yet been achieved. *Id.*

Second, “[e]stablishment of the GSF will strengthen the ties between the United States and our democratic ally and trading partner, Austria.” Albright Statement ¶ 5; *see* Eizenstat Decl. ¶ 34. One of the most important reasons the United States took such an active role in facilitating a resolution of the issues raised in this litigation is that it was asked by the Austrian Federal Government to work as a partner in helping to make both the Reconciliation Fund and the GSF initiatives a success. Albright Statement ¶ 9; Eizenstat Decl. ¶ 34. Since 1945, the United States has sought to work with Austria to address the consequences of the Nazi era and World War II through political and governmental acts, beginning with the first compensation and restitution laws in post-war Austria that were passed during the Allied occupation. Eizenstat Decl. ¶ 34. In recent years, Austrian-American cooperation on these and other issues has continued, and the joint effort to develop the Reconciliation Fund and the GSF has helped solidify the close relationship between the two countries. Albright Statement ¶¶ 5, 6; Eizenstat Decl. ¶ 34.

Austria today is an important factor in the prosperity of Europe, and particularly the new democracies of Central and Eastern Europe. Eizenstat Decl. ¶ 35. Austria has worked with the United States in promoting democracy for the last forty-six years, and is instrumental to the economic development of Central and Eastern Europe. Albright Statement ¶ 5; Eizenstat Decl. ¶ 35. A new member of the European Union, Austria has supported integration of the European Union as well as efforts to assure that the former communist countries of Central and Eastern Europe

continue their democratic development within a market economy. *Id.* Our continued cooperation with Austria is important to helping achieve these United States interests. *Id.*

Third, like the Reconciliation Fund, the GSF helps further the United States' interest in maintaining good relations with Israel and with Western, Central, and Eastern European nations, where many potential claimants now reside. Eizenstat Decl. ¶ 36. Those who are eligible to make claims under the GSF include the too-long forgotten "double victims" of two of the twentieth century's worst evils—Nazism and Communism. Albright Statement ¶ 8; Eizenstat Decl. ¶ 36. Some one million citizens of Central and Eastern Europe were forced into labor by the Nazis, over 100,000 of whom worked on the territory of the present-day Republic of Austria, and then lived for over four decades under the iron rule of Communist governments and were denied compensation until recent years. Eizenstat Decl. ¶ 36. The GSF complements the German Foundation as part of a comprehensive effort to make payments to survivors and heirs with Nazi-era property/aryanization claims in these former Iron Curtain countries, and, indeed, in other European countries. *Id.*

Fourth, the defendants and virtually all participating plaintiffs' counsel and victims' representatives are united in seeking dismissal of Nazi-era property/aryanization claims against Austria and/or Austrian companies (and all other claims covered by the GSF) in favor of the remedy provided by the GSF, and the United States strongly supports this position. Eizenstat Decl. ¶ 37. The alternative to the GSF would be years of litigation whose outcome would be uncertain at best, and which would last beyond the expected life span of the large majority of survivors. Albright Statement ¶ 3; Eizenstat Decl. ¶ 37. Ongoing litigation could lead to conflict among survivors' organizations and among survivors and Austria and Austrian industry, conflicts into which the United States Government would inevitably be drawn. *Id.* There would likely be threats of political action, boycotts, and legal steps against corporations from Austria, setting back Austrian-American economic cooperation. *Id.*

The Austrian Federal Government and Austrian companies have insisted on dismissal of all pending Nazi-era property/aryanization claims against Austria and/or Austrian companies (as well as any other claim covered by the GSF) as a precondition



to allowing the GSF to make payments to victims. Albright Statement ¶ 10; Eizenstat Decl. ¶ 38. The United States strongly supports the creation of the GSF, and wants its benefits to reach victims as soon as possible. Eizenstat Decl. ¶ 38. In the context of the GSF, therefore, it is in the enduring and high interest of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e., “legal peace” for) all property/aryanization claims against Austria and/or Austrian companies arising out of or relating to the Nazi era or World War II (and any other claims covered by the GSF), excluding claims for *in rem* restitution of works of art. Albright Statement ¶ 2; Eizenstat Decl. ¶ 38.

Fifth, and finally, the GSF, like the Reconciliation Fund, the German Foundation, and the French Bank Fund, is a fulfillment of a half-century effort to complete the task of bringing a measure of justice to victims of the Nazi era. “It is in the foreign policy interests of the United States to take steps to address the consequences of the Nazi era, to learn the lessons of, and teach the world about, this dark chapter in European history and to seek to ensure that it never happens again.” Albright Statement ¶ 4. Although no amount of money will ever be enough to make up for Nazi-era atrocities, the Austrian Federal Government has created compensation, restitution, and other benefit programs for Nazi-era acts that have resulted in significant payments. Eizenstat Decl. ¶ 39. With the \$150 million that the Austrian Federal Government is currently distributing to survivors pursuant to the Framework, the GSF adds \$210 million (plus interest), increased social benefits amounting to approximately \$112 million over the next ten years, and an arbitration process for *in rem* restitution of publicly-owned property, including property formerly owned by Jewish communal organizations, to these payments and complements prior programs. *Id.* and Ex. B, Annex A.

The United States does not suggest that the policy interests described above in themselves provide an independent legal basis for dismissal. Because of the United States’ strong interests in the success of the GSF, however, and because such success is predicated on the dismissal of the claims in this litigation, the United States recommends dismissal on any valid legal ground.

*[3].C. Under The Applicable Provisions Of The FSIA, The Austrian Federal Government Is Immune From Suit On Plaintiff's Claims In United States Courts.*

\* \* \* \*

*(1) The Actions Complained Of Do Not Come Within The "Commercial Activities" Exception Of The FSIA.*

The FSIA provides an exception from immunity in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States. 28 U.S.C. § 1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act," and states that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d).

*(a) The Actions Complained Of Did Not Constitute Commercial Activity.*

Applying the distinction between a state's public acts (*jure imperii*) and its private or commercial acts (*jure gestionis*), the Supreme Court in *Nelson* held that a foreign state engages in "commercial activity" where "it exercises 'only those powers that can also be exercised by private citizens,' as distinct from those 'powers peculiar to sovereigns.'" 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992)). A foreign government engages in "commercial activity" when it "acts, not as regulator of a market, but in the manner of a private player within it" *Weltover*, 504 U.S. at 614; see also *Corzo v. Banco Central de Reserva del Peru*, 243 F.3d 519, 525 (9th Cir. 2001) (quoting *Weltover*). The Court also

clarified the statutory directive that courts examine the “nature” of the transaction rather than its “purpose,” stating that “the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in ‘trade and traffic or commerce.’” *Nelson*, 507 U.S. at 360–61 (quoting *Weltover*, 504 U.S. at 614 (emphasis in original)); H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., at 16, *reprinted in* 1976 U.S.C.C.A.N. at 6615.

The conduct of Austria that plaintiffs complain of here does not constitute “commercial activity.” Austria’s acts were those of a sovereign and not those of a private player within a market. A sovereign which uses its police power to “expropriate,” “loot,” “liquidate,” and “aryanize” plaintiffs’ property during war, *see* Complaint ¶¶ 19, 22; *see also id.* ¶¶ 22–32 (alleging that the “substance of this action begins with . . . efforts by Defendants . . . to ‘aryanize’ the properties of Austrian Jews” and indicating that “Aryanization included . . . the devising of various actions in the nature of intimidation, coercion, physical and emotional brutalization, murder and other acts” which eliminated their ability to “participate in economic life, [and] earn a living”), is not engaging in the type of activity generally performed by private entities engaged in commerce. While the suffering experienced by plaintiffs was horrific, Austria’s actions were not commercial and were not actions that could be undertaken by private parties.

The actions plaintiffs allege were peculiarly sovereign in nature. *See Nelson*, 507 U.S. at 363 (ruling that the “powers allegedly abused were those of police and penal officers,” not the sort of activity exercised by private parties); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167–68 (D.C. Cir. 1994) (holding that kidnapping was not commercial activity under the FSIA); *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984) (determining that kidnapping and assassination could not be considered commercial activities under the FSIA); *see also Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) (“Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on sovereign activity”). The treatment plaintiffs complain of was a prolonged abuse of military power; “[h]owever monstrous such abuse undoubtedly may be, a foreign

state's exercise of that power has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Nelson*, 507 U.S. at 361.

*(b) The Actions Complained Of Did Not Have A Direct Effect In The United States.*

Even if the acts plaintiffs complain of did constitute "commercial activity," these acts did not have a "direct effect" in the United States as contemplated by § 1605(a)(2). In order for an act to have a "direct effect" in the United States within the meaning of § 1605(a)(2), it must follow "as an immediate consequence of the defendant's activity." *Lyon v. Agusta SPA*, 252 F.3d 1078, 1083 (9th Cir. 2001) (internal quotation marks omitted). This requirement incorporates the minimum contacts standard for personal jurisdiction originally set forth in *International Shoe v. Washington*, 326 U.S. 310 (1945). See *Security Pacific Nat'l Bank v. Derderian*, 872 F.2d 281, 286–87 (9th Cir. 1989).

The acts plaintiffs allege here were perpetrated between 1933 and 1945 against residents of Austria, in Austria, by Austrian defendants. See Complaint ¶ 20. Plaintiffs allege no immediate consequence of the alleged actions in the United States. See *Gregorian v. Izvestia*, 871 F.2d 1515, 1527 (9th Cir. 1989) (ruling that to establish a "direct effect," plaintiff must show "something legally significant actually happened in the U.S."). That is because, as plaintiffs point out, the immediate consequence of the actions alleged were felt by residents of Austria in Austria. See *id.* ¶ 29 ("These measures effectively eliminated the ability of Austrian Jews to own property, participate in economic life, earn a livelihood, and in some cases control enough assets to escape the racist program of Defendants by fleeing from Austria."); cf. *Adler v. Federal Republic of Nigeria*, 107 F.3d 720, 726–27 (9th Cir. 1997) (explaining that "mere financial loss by a person—individual or corporate—in the U.S. is not, in itself, sufficient to constitute a 'direct effect'"); *Australian Govt. Aircraft Factories v. Lynne*, 743 F.2d 672, 673–75 (9th Cir. 1984) (holding that financial effects felt in the United States of a plane crash in Indonesia were "indirect," and thus did not satisfy "direct effect" requirement of § 1605(a)(2)).

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(3) *The “Expropriation” Exception Is Inapplicable Here.*

The FSIA provides an exception from immunity in an action in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States. 28 U.S.C. § 1605(a)(3). Under § 1605(a)(3), “the property at issue must have been taken in violation of international law.” *Siderman de Blake*, 965 F.2d at 711.

The Ninth Circuit has ruled that § 1605(a)(3) “does not apply where the plaintiff is a citizen of the defendant country at the time of the expropriation, because ‘[e]xpropriation by a sovereign state of the property of its own nationals does not implicate settled principles of international law.’” *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095, 1105 (9th Cir. 1990), *quoted in Siderman de Blake*, 965 F.2d at 711. In *Chuidian*, the Ninth Circuit explained its ruling by reference to *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1396–98 (5th Cir. 1985), and *Dreyfus v. Von Finck*, 534 F.2d 24, 30–31 (2d Cir. 1976), in which both the Fifth and Second Circuits concluded that international law concerning takings of property addressed rights as between states, not individuals. Under this approach, § 1605(a)(3) requires a plaintiff to have held a specific foreign nationality at the relevant time, otherwise there could be no state-to-state dispute.

Although plaintiffs here refer to themselves as “Austrian Jews,” Complaint ¶ 21, they also argue that Austrian Jews “were ‘foreign nationals’ in Austria during World War II because the Austrian Government revoked the Austrian citizenship of Austrian Jews during World War II,” *id.* ¶ 399. It is unnecessary for the Court to decide whether plaintiffs were Austrian nationals, or, as plaintiffs appear to allege, stateless persons—which could require the Court to determine the legal effectiveness of these Nazi era actions—because plaintiffs do not allege that they were nationals of any nation other than Austria. Plaintiffs thus cannot, pursuant to

*Chuidian*, take advantage of § 1605(a)(3) to establish that this Court has jurisdiction over the claims raised in the Complaint.

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**c. *Claims concerning French banks***

In 1995, President Jacques Chirac of France publicly recognized France's debt to the victims of the German occupation and the Vichy Regime in France, and pledged that the French Government would make efforts to address all remaining vestiges of that period. One of those efforts was the creation, in January 1997, of the Study Mission on the Spoliation of Jews in France, known as the "Matteoli Mission," the aim of which was to study the conditions under which property belonging to Jews in France was confiscated by the occupying Nazi forces and Vichy authorities during the period 1940–1944.

In April 2000, the Matteoli Mission issued a 3,000 page report detailing various types of property spoliation that had occurred and attempting to quantify the extent of such spoliation. With respect to banking assets, the Mission found that some 56,400 people, holding some 80,000 bank accounts, were deprived of over seven billion francs in assets. While able to determine that some of that amount was restituted, the fate of significant portions of the spoliated bank assets remains unknown.

Among other things, the Matteoli Mission recommended (1) the creation of a commission to hear claims by individuals (or their heirs) who lost property that was never restituted—the Commission of the Victims of Acts of Despoilment Committed Pursuant to Anti-Semitic Laws in Force During the Occupation ("Drai Commission"), was established by a decree of the French Government in September 1999; (2) the creation of a foundation to support Holocaust education and memory and to provide financial support to victims of persecution and their families—the Foundation for Memory of the Shoah ("Foundation") was established by a decree of the French Government in December 2000.

Meanwhile, in December 1997 and December 1998, attorneys representing individuals with World War II era claims against French and other banks filed class action lawsuits in the United States seeking, among other things, to recover assets alleged to have been improperly retained by the banks during and subsequent to World War II. On August 31, 2000, Judge Sterling Johnson denied a motion to dismiss the cases. See *Bodner v. Banque Paribas*, 114 F. Supp. 2d 117 (E.D.N.Y. 2000) (consolidated cases).

In the fall of 2000, Deputy Treasury Secretary Eizenstat was approached separately by both the French Government and by the plaintiffs' attorneys in the cases pending in the U.S. Each sought U.S. Government assistance in facilitating a resolution of the pending class action litigation against French and other banks, drawing on the precedents that had recently been established in the German and Austrian negotiations. Attorneys for the banks welcomed U.S. Government assistance.

On January 18, 2001, after some two months of intensive negotiations among representatives of French banks, Holocaust victims, and the Governments of France and the United States, agreement was reached. In addition to maintaining their commitment to pay all well-documented, banking-related claims decided by the Draï Commission, the banks agreed to create a \$22.5 million supplemental fund, which would make payments to people with little or no documentation of their claims. In return, the plaintiffs' attorneys agreed to dismiss with prejudice all pending lawsuits against the banks. Following the model of both the German and Austrian negotiations, this resolution was memorialized in a Joint Statement signed by all of the participants to the negotiations and an Executive Agreement between the United States and France. Both documents were signed on January 18, 2001. The latter, which contains, among other things, the United States' commitment to file Statements of Interest in all World War II-related cases against the banks, entered into force on February 5, 2001. The Statements would assert the United States' foreign policy interests in the Fund, the Draï Commission, and the Foundation being treated as the exclu-

sive remedies for Holocaust-related claims against French banks and recommend dismissal on any valid legal ground.

The United States filed its Statement of Interest in *Bodner v. Banque Paribas*, 98 Civ. 7851 (CST) (MDG) (E.D.N.Y.), on February 23, 2001. On March 27, 2001, the claims were dismissed with prejudice as to the named plaintiffs only. On June 5, 2001, the United States filed its Statement of Interest in *Mayer v. Banque Paribas, et al.*, Civ. Action No. 302226 (Cal. Superior Court). This case was dismissed on June 15, 2001. Excerpts below from the Statement of Interest in *Bodner* provide the views of the United States.

While the Draï Commission had been processing claims even prior to the dismissal of the litigation, pursuant to the Joint Statement, the Fund began distributing money to claimants only after all of the above cases had been dismissed.

The Joint Statement, Executive Agreement and Declaration of Secretary Eizenstadt as well as the *Bodner* Statement of Interest are available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## DISCUSSION

### 1. Dismissal of this Litigation Would Be in the United States' Foreign Policy Interests

It would be in the foreign policy interests of the United States for the Draï Commission, the Fund, and the Foundation to be the exclusive fora and remedies for the resolution of all claims asserted against banks arising from their activities in France during World War II, including without limitation those relating to “aryanization” or other confiscation of, damage to, or loss of property, including banking assets. *See* Eizenstat Decl. ¶ 29 and Exh. B at Art. 1(1). Accordingly, the United States believes that all claims asserted should be pursued through the Draï Commission instead of the courts. The United States’ interests in supporting the Draï Commission, the Fund, and the Foundation are explained below.

First, it is an important policy objective of the United States



to bring some measure of justice to Holocaust survivors and other victims of the Nazi era, who are elderly and are dying at an accelerated rate, in their lifetimes. Eizenstat Decl. ¶ 30. Over one hundred thousand Holocaust survivors, including many who emigrated from France, live in the United States. *Id.* As noted earlier, the United States believes the best way to accomplish this goal is through negotiation and cooperation.

The Drai Commission, the Fund, and the Foundation are an excellent example of how such cooperation can lead to a positive result. These fora will, without question, provide benefits to more victims, and will do so faster and with less uncertainty than would litigation, with its attendant delays, uncertainty, and legal hurdles. Moreover, the Drai Commission and the Fund will employ standards of proof that are far more relaxed than would be the case with litigation. Litigation, even if successful, could only benefit those able to make out a claim against a bank over which they could obtain jurisdiction in the United States. By contrast, the Drai Commission, the Fund, and the Foundation will benefit all those with claims against banks that were active in France during World War II, regardless of whether such banks are still in existence today. The creation of the Fund by the banks, the commitment by the banks to pay all awards recommended by the Drai Commission, and the participation in the Foundation not only by the banks but by the Government of France and other financial institutions, allow comprehensive relief for a broader class of victims than would be possible in United States judicial proceedings. Eizenstat Decl. ¶ 31. In addition, the Foundation will be dedicated in part to important efforts to ensure that crimes like those perpetrated during the Nazi era never happen again. *Id.* ¶ 32.

Second, establishment of the Fund, and recognition of the Drai Commission and the Foundation, helps further the close cooperation between the United States and its important European ally and economic partner, France. One of the reasons the United States took an active role in facilitating a resolution of the issues raised in this litigation is that the United States Government was asked by the French Government to work as a partner with it in helping to make its efforts a success. In recent years, French-American cooperation on these and other issues has been very close, culminating in the joint effort to resolve these complex

issues. This has helped solidify the ties between our two countries, ties which are central to U.S. interests in Europe and the world. *Id.* ¶ 34.

France is the oldest ally of the United States, and a major political partner on the international scene. As a member of the United Nations Security Council, NATO, the European Union, the Organization on Security and Cooperation in Europe, and the Council of Europe, France plays a critical role on issues that directly affect U.S. national interests. France has collaborated closely with the United States in important areas such as the Middle East peace process, the Balkans, and reform of the United Nations. France is a major member state of the European Union, with which the U.S. has trading relations amounting to more than a trillion dollars a year. We work closely with our French allies over a broad agenda—political, economic and social—and need their cooperation in achieving many of our goals, including with respect to Holocaust assets. Given the many challenges the U.S. will face in the future and the importance of the relationship with France, it is essential that we work to diminish any potential irritants between the two countries. *Id.* ¶ 35.

Third, dismissal of this lawsuit would be in the foreign policy interests of the United States. The participating plaintiffs' counsel, the defendants, victims' representatives, and the French Government are united in seeking dismissal of this litigation in favor of the remedy provided by the Draï Commission, the Fund, and the Foundation, and the United States strongly supports this position. The alternative would be years of litigation whose outcome would be uncertain at best, and which would last beyond the expected life span of the large majority of survivors. *Id.* ¶ 36.

In addition, ongoing litigation could lead to conflict among survivors' organizations and between survivors and the banks, conflicts into which the United States and French Governments would inevitably be drawn. There would likely be threats of political action, boycotts, and legal steps against corporations from France, setting back European-American economic cooperation. *Id.*

Dismissal of all pending litigation in the United States in which Holocaust-related claims are asserted against banks relating to their activities in France during World War II was accepted by all as a precondition to allowing the Fund to make payments to victims. The United States strongly supports the creation of the Fund,

and wants its benefits to reach victims as soon as possible. Therefore, in the context of the Fund, it is in the enduring and high interest of the United States to vindicate that forum by supporting efforts to achieve dismissal of (i.e., “legal peace” for) all Holocaust-related claims against the banks. *Id.* ¶ 37. *See also* Executive Agreement (Eizenstat Decl. Exh. B) at Art. 1(1).

Fourth, and finally, the Fund, the Drai Commission, and the Foundation are a fulfillment of a half-century effort to complete the task of bringing justice to victims of the Nazi era. Since the liberation of France in 1944, France has made compensation and reconciliation for wrongs committed during the occupation and Vichy regime an important part of its political agenda. Although no amount of money will ever be enough to make up for all Nazi-era crimes, the French Government has over time created significant compensation and restitution programs for Nazi-era acts. The Fund and the Foundation add another \$400 million to that total, over and above whatever claims are ultimately paid through the Drai Commission, and complement these prior programs. *Id.* ¶ 38.

The United States does not suggest that these policy interests described above in themselves provide an independent legal basis for dismissal. Moreover, in this Statement, the United States takes no position on the merits of the underlying legal claims or arguments advanced by plaintiffs or defendants. Because of the United States’ strong interests in the success of the Drai Commission and the Foundation, and in the creation of the Fund, however, and because creation of the Fund is predicated on the dismissal of this litigation, the United States recommends dismissal on any valid legal ground.

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### **3. The Drai Commission, the Fund, and the Foundation Provide a Fair Remedy For Those With Claims Against Banks Arising out of Their Activities in France During World War II**

Although substantive consideration of the fairness of the dismissal is not required, *see Diaz*, 876 F.2d at 1408, the United States has reached the conclusion that the results of the negotiations as embodied in the Drai Commission, the Fund, and the Foundation are fair under all the circumstances. The circumstances that lead

the United States to this conclusion are described below.

Given the advancing age of the plaintiffs, it is of the highest importance that their claims are resolved quickly, non-bureaucratically, and with minimum expenditures on litigation. . . .

\* \* \* \*

Other criteria important in evaluating the Drai Commission, the Fund, and the Foundation include their level of funding and procedures for prompt resolution of claims. One of the remarkable aspects of the mechanism set up by the French Government is the commitment by the French Government and the banks that the banks will pay all awards directed to them by the Drai Commission, regardless of the total amount eventually required. *See* Executive Agreement (Eizenstat Decl. Exh. B) at Annex B ¶ I.D. It is therefore no exaggeration to say that the level of funding of this resolution is unlimited. In addition, the funding of the Foundation—at about \$375 million—is designed to represent complete disgorgement not only of assets that were not returned to their rightful owners, but also of assets that *may or may not* have been returned, but about which there is simply insufficient information in the historical record.

Of course, whenever one evaluates the level of funding in a resolution such as this one, it is important to consider the words of a Holocaust survivor who spoke in favor of the Swiss Bank settlement, cited by Judge Korman in approving that settlement:

I have no quarrel with the settlement. I do not say it is fair, because fairness is a relative term. No amount of money can possibly be fair under those circumstances, but I'm quite sure it is the very best that could be done by the groups that negotiated for the settlement. The world is not perfect and the people that negotiated I'm sure tried their very best, and I think they deserve our cooperation and . . . that they be supported and the settlement be approved.

*In re Holocaust Victim Assets Litigation*, 105 F. Supp.2d at 141.

The United States, together with attorneys and other representatives of the victims, also believes that the procedures adopted by the Drai Commission for prompt resolution of claims are fair. Claims are to be evaluated under relaxed standards of proof and

paid expeditiously. *See* Executive Agreement (Eizenstat Decl. Exh. A) at Annex B ¶ I.B. Claimants are permitted to have representatives assist them, and will also be assisted by the French Government if they live outside France and by victims' organizations with access to historical lists of unclaimed accounts. *Id.* at Annex B ¶¶ I.B, I.G, I.H. Claimants will be entitled to appeal adverse decisions. *Id.* at Annex B ¶ I.K. And the Fund will even make payments to individuals for whom there is no substantiation of lost bank assets, but who can merely provide "credible evidence that suggests there may have been such assets." *Id.* at Annex B ¶ I.F. With these agreements, the Draï Commission and Fund will be able to make speedy, dignified payments to many deserving victims—indeed, as noted earlier, many more than could possibly recover through litigation. In addition, the Draï Commission will issue regular public reports as part of its commitment to operate in a transparent manner. *Id.* at Annex B ¶ I.J.

In considering the fairness of the Draï Commission, the Fund, and the Foundation, it is also important to consider the numerous legal hurdles and difficulties of proof faced by plaintiffs and the uncertainty of their litigation prospects. Although the United States takes no position here on the merits of the underlying legal claims advanced by the parties, and the Court need not ultimately resolve those questions in the context of a voluntary dismissal, it is beyond dispute that, because of the time elapsed since World War II and the variety of legal defenses to plaintiffs' claims, recovery in litigation is by no means assured. *Cf. In re Holocaust Victim Assets Litigation*, 105 F. Supp.2d at 148–49; *In re Nazi Era Claims Against German Defendants Litigation*, 2000 WL 1876641 at \*19.

\* \* \* \*

#### **d. Issues of state law**

On March 7, 2001, Ambassador J.D. Bindenagel, Special Envoy for Holocaust Issues, wrote to members of the New Jersey State Senate and General Assembly expressing concerns that New Jersey draft legislation, the "Holocaust Victim Insurance Claim Registry and Relief Act," could be counterproductive to ongoing efforts to address the same issue

through multilateral cooperation. Excerpts from his letter provided below explain how the issues in the draft legislation are being addressed through the International Commission on Holocaust Era Insurance Claims (ICHEIC), the German Foundation, and the Austrian General Settlement Fund.<sup>3</sup>

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I am writing about the New Jersey draft legislation, the “Holocaust Victim Insurance Claim Registry and Relief Act,” (A 422/S 2128). While I appreciate the underlying objective of A 422/S 2128, I am concerned that this legislation, if enacted,

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<sup>3</sup> Litigation concerning state insurance laws in Florida and California is discussed in *Digest 2000*, Chapter 8.B.1.3. In 2001 the Ninth Circuit reversed and remanded a decision by the U.S. District Court of the Eastern District of California finding a California law (the Holocaust Victim Insurance Relief Act (“HVIRA”) unconstitutional. *Gerling Global Reins. Corp. of Am. v. Low*, 240 F.3d 739 (9th Cir. 2001). The district court had enjoined enforcement of the statute, concluding that HVIRA interfered with the federal government’s control over foreign affairs and that it violated the Commerce Clause. Although the Ninth Circuit held that the district court erred in finding a violation of the Commerce Clause and the foreign affairs power, it remanded to the district court to address plaintiffs’ claim that HVIRA violates the Due Process Clause. On remand, the district court granted summary judgment for the plaintiff insurance company. It found that the statute, which mandated suspension of licenses for insurance companies that failed to provide extensive information related to policies sold to persons in Europe between 1920 and 1945 directly or through a “related company,” violated the Fourteenth Amendment: “By mandating license suspension for non-performance of what may be impossible tasks without allowing for a meaningful hearing, HVIRA deprives plaintiffs of a protected property interest without affording them due process of law.” *Gerling Goba Reins. Corp. of America v. Low*, 186 F. Supp. 2d 1099, 1113 (E.D. Cal. 2001). At the end of 2001 a petition for certiorari was pending. As to the Florida Holocaust Victims Insurance Act, the Court of Appeals for the Eleventh Circuit upheld a decision by the U.S. District Court for the Northern District of Florida granting summary judgment for the insurance companies. The Eleventh Circuit held that “the district court correctly reasoned that, to the extent the Act calls for the production of information by these Plaintiffs regarding Holocaust-era policies issued outside Florida by German entities having only some corporate affiliation with them and no other contacts to Florida, it violates Due Process limits on legislative jurisdiction.” *Gerling Global Reins. Corp. of America v. Gallagher*, 267 F.3d 1228, 1240 (11th Cir. 2001).

could be counterproductive to ongoing efforts to address this important issue through multilateral cooperation. Please permit me to explain.

Let me assure you that the State of New Jersey and the U.S. Government share the important goal of bringing justice to Holocaust survivors by ensuring that their insurance policies, issued in Europe during the Holocaust era, are paid. The U.S. government has supported efforts in the International Commission on Holocaust Era Insurance Claims (ICHEIC) to create what we believe should be seen as the exclusive forum for paying unpaid insurance claims from the Holocaust era. The ICHEIC's claims process was launched more than a year ago and provides for the opening of company files and the cross-checking of names with Yad Vashem's records of Holocaust victims, as well as procedures for worldwide outreach, audit and appeals. With its claims process well underway, the ICHEIC is producing tangible benefits now for Holocaust survivors, victims, their heirs and beneficiaries. Conceived by State insurance regulators in the United States, and chaired by former Secretary of State Lawrence S. Eagleburger, the ICHEIC merits our full support.

Another multilateral effort in which the U.S. Government played a role has resulted in the establishment of a Foundation under German law entitled, "Remembrance, Responsibility and the Future." The Foundation will be capitalized with DM 10 billion (approximately \$4.7 billion) for approximately one million eligible claimants. The Foundation will make dignified payments to survivors in recognition of the suffering they endured as slave and forced laborers and also covers other personal injury claims and property loss or damage caused by German companies during the National Socialist era, including claims against German banks and insurance companies.

Victims' interests were broadly and vigorously represented throughout the negotiations that led to the creation of the Foundation. Class action lawyers and representatives of victims' groups in the United States, Israel and Central and Eastern Europe fully and actively participated in the discussions that led to the creation of the Foundation, signed a Joint Statement at the conclusion of the negotiations, and accepted the Foundation as a valid and worthy result. The class action lawyers who participated in the negotiations agreed to dismiss any Nazi era lawsuits

pending against German companies. The United States and the Federal Republic of Germany signed an Executive Agreement which committed Germany to operate the Foundation under the principles to which the parties to the negotiations had agreed, and committed the United States to take certain steps to assist German companies in achieving “legal peace” in the United States for claims arising out of the National Socialist era and World War II.

During the course of our negotiations, President Clinton concluded that it would be in the United States’ foreign policy interests for the “Remembrance, Responsibility and Future” Foundation to be the exclusive forum and remedy for the resolution of all claims against German companies arising out of the Nazi era and the Second World War. The U.S. Government filed statements of interest recommending dismissal on any valid legal ground in court cases brought against German companies for wrongs committed during the Nazi era, and committed to do so in future cases that would be covered by the Foundation agreement. For your reference, I am enclosing copies of the relevant documents on the Foundation which are also available on the Internet at <http://www.us-botschaft.de/policy/holocaust/index.htm>.

The ICHEIC and the “Remembrance, Responsibility and the Future” Foundation are not mutually exclusive. Chairman Eagleburger agreed to link the ICHEIC with the Foundation because the intended beneficiaries of the ICHEIC and the Foundation are identical with regard to insurance, and because no insurance company should have to pay twice. The law establishing the Foundation provides DM 200 million for the settlement of unpaid insurance policies issued by German insurance companies, their foreign portfolios and subsidiaries, that are claimed through the ICHEIC, as well as for the associated costs; and DM 350 million for the ICHEIC humanitarian fund. The U.S.-German Executive Agreement provides that insurance claims made against German insurance companies will be processed according to current ICHEIC claims handling procedures and under any additional claims handling procedures that may be agreed upon among the Foundation, ICHEIC, and the German Insurance Association. We hope that the ongoing discussions to work out the details of the relationship between the ICHEIC and the German Insurance Association will be finalized soon.



A similar effort to address Nazi-era property issues, including those related to unpaid insurance policies, on the territory of present-day Austria was recently concluded whereby Austria and Austrian companies agreed to contribute \$210 million to a fund—the General Settlement Fund—to address such issues. The United States facilitated these negotiations involving the Austrian government, Austrian companies and a wide array of victims' representatives. The United States has undertaken similar commitments with respect to the Austrian Fund as it has undertaken concerning the German Foundation. Enclosed are copies of the relevant documents on the General Settlement Fund, also available on the Internet at <http://www.us-embassy-vienna.at/restitution.html>.

Now is not the time for sanctions or other measures that divert attention from cooperation to confrontation. Although based on legitimate concern for Holocaust survivors, some state-level actions could undermine the work of the German Foundation, the ICHEIC and the Austrian Settlement Fund, and provide a disincentive for those companies that would explore participation in these processes. Threats interfere with the conduct of international business, especially in the cases of insurance companies that have agreed to cooperate fully with the ICHEIC to pay outstanding claims from the National Socialist era. Revocation of licenses and other punitive actions will shift the focus away from the claims resolution we all desire to a debate over those actions.

Given the importance of compensating Holocaust survivors during their lifetimes, I hope that you will express strong support for the German Foundation and the ICHEIC, as well as the Austrian General Settlement Fund, and urge all affected companies and governments to support these international cooperative efforts.

## 2. Other international law basis

In *Macharia v. United States*, Civil Action No. 99-3274,<sup>4</sup> plaintiffs brought claims against the United States for injuries resulting from the terrorist bombing of the U.S. Embassy in

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<sup>4</sup> Similar claims are pending in *Bichage v. United States*, Civil Action No. 00-1636.

Nairobi, Kenya, on August 7, 1998. Plaintiffs, all of whom are Kenyans who were off of the Embassy premises when the bomb exploded, alleged that the Embassy building was inherently dangerous, that the United States failed to warn them of a known terrorist threat, and that the United States failed to implement adequate security at the diplomatic post. As a result, they allege that the Embassy was a public nuisance and that the United States is responsible for the injuries they suffered. In a Memorandum in Support of Motion to Dismiss, filed by the United States on July 16, 2001, the United States argued that the court lacks subject matter jurisdiction over these claims because the tort claims arose in Kenya and are therefore not covered by the Federal Tort Claims Act ("FTCA") relied on by plaintiffs; the FTCA exempts from its scope actions taken by an independent contractor, in this case the company responsible for hiring, training, and supervising the local guards in Nairobi; and the FTCA exempts from its scope discretionary actions, which would include any decisions and actions taken by the State Department regarding the matters at issue in this case. The Memorandum also argued that the political question doctrine precludes review of plaintiffs' claims "to the extent that plaintiffs complain that the Embassy was not built and maintained as a virtual fortress." Finally, the United States argued that plaintiffs' allegation that the United States violated "'elemental principles of international law,' the constitution of Kenya, and customary international law through the International Covenant on Civil and Political Rights," failed to state a claim under international law. Excerpts from the Memorandum on this last point are set forth below. Internal citations to the Complaint have been deleted.

The full text of the Memorandum Supporting Motion to Dismiss is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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In an attempt to rescue a claim they made in their previous litigation, *Mwani. et al. v. United States. et al.*, Civil Action 99-125 (CKK), plaintiffs allege that the United States violated

“elemental principles of international law,” the constitution of Kenya, and customary international law through the International Covenant on Civil and Political Rights. . . . In *Mwani*, plaintiffs alleged that the United States violated the first two, but this Court dismissed that Count, holding that the plaintiffs “do not cite any legal authority for the proposition that the United States has consented to be sued for violations of the Kenyan constitution. Furthermore, the Amended Complaint forces the United States (and the Court) to guess at precisely which ‘elemental principles of international law’ would be at issue.” November 19, 1999 Memorandum Opinion at 7–8. In an apparent effort to avoid the same fate, plaintiffs assert that the United States is “responsible for carrying out its obligations under its treaties or under customary international law,” . . . including “avoidance of systematic racial discrimination.” . . . Plaintiffs’ assertions fail to state a claim under international law, and, even if such a claim existed, plaintiffs fail to establish that this Court would have jurisdiction over it.

“Customary international law,” or the “law of nations,” is not clearly defined. The Court of Appeals has described it as

a general and consistent practice of states followed by them from a sense of legal obligation. Thus, customary international law is continually evolving. At a crucial stage of that process, within the relevant states, the will has to be formed that the rule will become law if the relevant number of states who share this will is reached. As to what constitutes the necessary number of relevant states, the [International Court of Justice] has said that state practice . . . should have been both extensive and virtually uniform in the sense of the provision invoked. Finally, in order for such a customary norm of international law to become a peremptory norm, there must be a further recognition by the international community *as a whole* that this is a norm from which no derogation is permitted.

*Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 940 (D.C. Cir. 1988) (internal quotations and citations omitted) (emphasis in original). The Court of Appeals for the Second

Circuit has described violations as “forms of conduct [that] violate the law of nations” including piracy, slave trade, genocide, and airline hijacking. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995), *cert. denied*, 518 U.S. 1005 (1996). *See also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (J. Edwards) (describing genocide, slavery, murder, torture, prolonged arbitrary detention, and systematic racial discrimination as violations of the law of nations); *Jane Doe v. Islamic Salvation Front*, 993 F. Supp. 3, 7–8 (D.D.C. 1998).

Tellingly for plaintiffs, however, the Court of Appeals has held that individuals fail to state a cause of action when they allege violations of customary international law and that, without an express jurisdictional basis, District Courts cannot consider their claims. This rule was most clearly set forth in *Committee of U.S. Citizens*, where United States citizens living abroad brought suit against the United States asking that the Court enjoin continued funding of the Nicaraguan *contras*. Plaintiffs alleged that because the United Nations’ International Court of Justice had already ruled that such funding violated customary international law, this Court could find a violation of such law, of Article 94 of the United Nations Charter, and of the Administrative Procedure Act. 859 F.2d at 932. The Court of Appeals disagreed and expressly rejected plaintiffs contention that a finding that the United States had violated an international norm “operated domestically as if it were a part of our Constitution.” *Id.* at 940.

Similarly, the Supreme Court held that a Mexican prisoner could be tried in a United States District Court even though he had been abducted from Mexico by state actors and brought to the United States for prosecution. *United States v. Alvarez-Macham*, 504 U.S. 655, 669 (1992). “The general principles [of customary international law] . . . simply fail[ed] to persuade” the Court that it should “imply in the terms of the United States-Mexican Extradition Treaty a term prohibiting international abductions” even where the conduct of governmental agents was “shocking” and “in violation of general international law principles.” *Id.* In short, whether the prisoner should be returned to Mexico was “a matter for the Executive Branch.” *Id.*; *cf. Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1173 (D.C. Cir. 1994) (dismissing claims under the Foreign Sovereign Immunities

Act by United States citizen and Holocaust survivor against Germany for slavery by the Third Reich).

Here, plaintiffs do not even specify what cause of action is created by international law under which they might be able to sue the United States. They make vague allegations that the Department impermissibly secured the Embassy “Compound” after the bombing denying Kenyans “access” to the facility and restricting their movements.<sup>17</sup> And, they allege that the Department directed and controlled relief and medical operations. They can make no showing that these actions—taken to protect and help plaintiffs and other victims—rise to the level of a violation of international norms or even that they violate the express terms of the international Convention on Civil and Political Rights.<sup>18</sup> Moreover, as this Court has already held, there is no waiver of sovereign immunity to allow a suit against the sovereign under the foreign constitutions or conventions upon which plaintiffs rely. *See Mwani Memorandum Opinion* at 7. Thus, plaintiffs fail to state a claim under Count Three.

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### Cross-references

*Claims by “comfort women” against japan, Chapter 10.A.2.*  
*Claims by U.S. hostages against Iran, Chapter 10.A.4c.*

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<sup>17</sup> Of course, plaintiffs primary contention is that the Department failed to adequately secure the Compound and did not restrict access to the building adequately before the bombing. *See* Counts One and Two. Therefore, their assertion that the United States somehow impermissibly did so after the bombing can best be described as inconsistent.

<sup>18</sup> While the United States is a party to the ICCPR, Congress made clear that the convention does not create a private cause of action in United States courts and that it is not self-executing. Sen. Exec. Rept. 102–23, 102d Cong., 2d Sess. at 19, 28 (1992).



## CHAPTER 9

# Diplomatic Relations, Continuity and Succession of States

### A. AFGHANISTAN

In a press briefing on December 21, 2001, Richard Boucher, Assistant Secretary of State for Public Affairs, announced that the United States would regard the Afghan Interim Authority ("AIA"), led by Hamid Karzai, as the Government of Afghanistan as of the date it took power, December 22, 2001. The creation of the AIA was one element of the Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions. That agreement, commonly referred to as the Bonn Agreement, was reached by four principal Afghan opposition groups and witnessed on behalf of the United Nations by Lakhdar Brahimi, Special Representative of the Secretary-General for Afghanistan, on December 5, 2001 in Bonn, Germany (available at [www.uno.de/frieden/afghanistan/talks/agreement.htm](http://www.uno.de/frieden/afghanistan/talks/agreement.htm)). Excerpts from the transcript of the briefing are provided below.

The full text is available at [www.state.gov/r/pa/rmo/hglt/01](http://www.state.gov/r/pa/rmo/hglt/01).

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. . . I wanted to make some comments today on the events that will take place tomorrow in Afghanistan, and that is the installation of the Interim Administration, the governing authority for Afghanistan. This has been the product of a lot of effort by Afghans and by the international community, and it is a very wel-

come event in terms of bringing stability and peace to a region that has long been troubled.

The UN Security Council has now given a mandate to an interim security assistance force. That is in Resolution 1386 that was passed yesterday. The British have offered to lead such a force, and have already got some elements of that force on the ground. The international community has also pledged to support the Interim Administration financially, and we have, as you know, had several conferences of potential donors. There is a meeting of the Afghan Donor Steering Group that has gone on yesterday and today in Brussels, and they continue to plan for our support for the reconstruction of Afghanistan and then it will lead to another conference in January in Japan to work even more and plan even more specifically how the international community can continue to support the Interim Authority in this whole process, leading back to a representative and broadly based government for Afghanistan.

So this government starts off with strong international support. For the United States, we look forward to working with the Interim Administration as the government of Afghanistan, and we have our diplomatic representation there. Ambassador Dobbins will attend the ceremonies for us tomorrow, and we have a team in Kabul that will be there to work with the government as it goes forward.

Even more than that, I think, for the Afghan people, the installation of this Interim Authority, with the full support of the international community, it offers them a chance to pursue their lives, to pursue normal lives in an atmosphere of peace and stability for the first time after many, many years of trouble, and that perhaps is the most welcome of all the effects of this event.

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The United States had already opened a Liaison Office in Kabul on December 16, 2001. It viewed the opening of the Liaison Office as the restaffing of a continuing diplomatic mission to the state of Afghanistan and viewed the mission as enjoying the rights and privileges of a diplomatic mission under the Vienna Convention on Diplomatic Relations, based on Afghanistan's continuing as a party to that treaty. The



State Department Press Office provided the following information on the reopening of the Mission in response to a question on December 14, 2001.

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Ambassador Dobbins will arrive in Kabul on Sunday, December 16. He will be joined by a small number of other U.S. State Department employees and a Marine Security Guard detachment to formally re-establish the United States diplomatic presence in Afghanistan as he takes up the position of Director of the U.S. Liaison Office in Kabul.

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Our Liaison Office will begin operations on December 16. Its purpose, as that of any diplomatic mission, will be to carry out the policy goals of the United States through its interactions with Afghans and foreigners as appropriate, to provide information and analysis to the Department of State and the U.S. Government, to coordinate activities with Afghans, foreign governments and organizations, U.S. agencies and American citizens and groups, and to provide consular services as appropriate.

The United States has continued to maintain diplomatic relations with the state of Afghanistan, even though we have not for some time recognized that the Taliban or anyone else is capable of speaking for Afghanistan internationally. Under the Bonn Agreement, the Afghans have agreed that the Interim Authority will represent Afghanistan in its external relations. The Liaison office will deal with the Interim Authority accordingly when it assumes power on December 22.

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On December 30, 2001 the United States was informed by diplomatic note that the IA had appointed a Charge d'Affaires for its Embassy in Washington, D.C.

At the end of 2001 steps were being taken to designate the U.S. Liaison Office in Kabul as U.S. Embassy Kabul and for the reopening of an Afghanistan Embassy in the United States. (The mission in Afghanistan was designated U.S. Embassy Kabul on January 18, 2002. The Charge d'Affaires

for Afghanistan was accredited in the United States on January 9, 2002 and the United States approved the AIA's lease of temporary office space as an embassy in Washington, D.C. on January 11, 2002, to be used while the Embassy building is under repairs.)

## **B. EAST TIMOR**

Since October 1999, East Timor has been administered by the United Nations Transition Administration in East Timor ("UNTAET"), pursuant to Security Council Resolution 1272. On August 30, 2001, East Timor held its first democratic elections, organized by the United Nations to choose 88 members of a Constituent Assembly that would be responsible for drafting a constitution. Fifty-five of the eighty-eight members elected belong to The Revolutionary Front for an Independent East Timor. The newly-elected Constituent Assembly announced that independence should be declared on May 20, 2002.

This decision was endorsed by the UN Security Council on November 1, 2001. At the same time, the Security Council concurred with Secretary-General Koffi Annan's assessment that the United Nations should remain engaged in East Timor to protect the major achievements realized by UNTAET and to assist the new government in ensuring security and stability. Excerpts below from remarks by Ambassador James B. Cunningham, United States Deputy Permanent Representative to the United Nations, October 31, 2001, provide the views of the United States.

The full text of Ambassador Cunningham's remarks is available at [www.un.int/usa/o1\\_156.htm](http://www.un.int/usa/o1_156.htm).

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We welcome the Secretary-General's report on East Timor. UNTAET, working with the East Timorese, has done very serious work and it shows. The United States joins other council members in endorsing the Secretary-General's proposals for the

way ahead: both the transition from now until independence and the plan for a successor mission.

We endorse these recommendations in the context of our support for UNTAET and a continuing international presence, UNTAET's ongoing downsizing and the UN's initial work on a reasonable and rational exit strategy.

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. . . I would like to encourage the Council, the United Nations, and the East Timorese themselves to agree that a good definition of ultimate success in East Timor will be when the last UN staff members leave and an independent and stable East Timor stands up on its own.

To get there, the United Nations and the East Timorese will need to work with the widest range of bilateral donors and interested agencies to ensure that as the extraordinary measures financed through peacekeeping progressively diminish within two years, other appropriate mechanisms of support are in place.

Minister Alkatiri, the East Timorese must help this process by focusing on a democratic, harmonious and peaceful way forward; practicing fiscal responsibility and programmatic rigor; capturing as much as the United Nations and others can teach and as quickly, and setting the right priorities.

UNTAET must help this process by staying on schedule with the downsizing it has set for itself between now and independence, working even harder to develop—and implement—the big picture of how UN efforts fit with those of other actors, and in the near future elaborating its plan for getting from the independence-day successor mission numbers to a goal of zero, or near zero, peacekeeping-financed support by mid-2004.

If we can all do that, we can truly talk about a UN success story, and a success story for the people of East Timor was well.



## CHAPTER 10

### Immunities and Related Issues

#### A. SOVEREIGN IMMUNITY

Under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602 *et seq.*, a state and its instrumentalities are immune from the jurisdiction of U.S. courts unless one of the specified exemptions in the statute applies. The FSIA provides the sole basis for obtaining jurisdiction over a foreign sovereign in U.S. courts. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). For a number of years before enactment of the FSIA, courts abided by “suggestions of immunity” from the State Department. When foreign nations failed to request such a suggestion from the Department of State, however, the courts made the determination. The FSIA was enacted “in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to ‘[assure] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process,’ H. R. Rep. No. 94-1487, p. 7 (1976).” *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983).

In the FSIA’s exception for “commercial activities,” Congress codified the “restrictive” theory of sovereign immunity, under which a state is entitled to immunity with respect to its sovereign or public acts, but not those which are private or commercial in character. Generally speaking, a state engages in commercial activity when it exercises “only those powers that can also be exercised by private citizens” as distinct from “powers peculiar to sovereigns.” *Verlinden B.V. v.*

*Central Bank of Nigeria*, 461 U.S. 480 (1983). The test for making this distinction is the nature of the transaction in question (the outward form of the conduct which the foreign state performs or agrees to perform) as opposed to the intent behind it (the reason why the foreign state engages in the activity). See *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992) (“the commercial character of an act is to be determined by reference to its ‘nature’ rather than its ‘purpose’,” *id.* at 614).

From the beginning the FSIA has provided certain other exceptions to immunity, such as by waiver. Over time, amendments to the FSIA have incorporated additional exceptions. See § 1605(a)(1) to (7).

## **1. Definition of Foreign State**

In *Lehman Brothers Commercial Corporation v. MinMetals International Non-Ferrous Metals Trading Co.*, 169 F. Supp. 2d 186 (S.D.N.Y. 2001), the U.S. District Court for the Southern District of New York held that a commercial entity which is wholly owned by an agency or instrumentality of a foreign state qualifies as an agency or instrumentality itself under § 1603(b).

## **2. No *Jus Cogens* Exception to FSIA**

On October 4, 2001, the U.S. District Court for the District of Columbia dismissed a suit against Japan on grounds of sovereign immunity and political question. *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52 (D.D.C. 2001). The suit was brought by South Korean, Chinese and Filipino women, as well as residents of Taiwan, who were forcibly abducted and held as “comfort women” or sex slaves before and during World War II by Japanese military forces. In its dismissal order, the District Court held that even if the FSIA applied retroactively to claims arising before its enactment, Japan’s acceptance of the Potsdam Declaration had not been an explicit waiver of immunity, that the alleged *jus cogens* viola-

tions by Japan did not constitute an implied waiver, and that the comfort women system did not constitute a commercial activity under the relevant statutory provision. Even if Japan did not enjoy sovereign immunity from the claims in question, the Court said the claims presented a non-justiciable political question.

On April 27, 2001, the United States filed a Statement of Interest in support of Japan's motion to dismiss. As the United States stated in that filing,

The horror of plaintiffs' ordeal can scarcely be overstated. There is no dispute about the moral force animating their quest to redress the wrongs done to them. At the conclusion of the Second World War, the United States condemned, in the strongest possible terms, the Japanese Government's conduct before and during the War. The United States and its allies conducted War Crimes Trials, which resulted in the execution or other punishment of hundreds of Japanese perpetrators of atrocities. Despite our deep sympathy for the plaintiffs, the United States is nonetheless compelled to file this Statement of Interest in order to explain that this Court has no jurisdiction over plaintiffs' claims due to Japan's sovereign immunity and by virtue of international obligations entered into by the United States and other nations with Japan at the close of World War II, which render plaintiffs' claims nonjusticiable.

Excerpts from the U.S. Statement of Interest set forth below first address Japan's sovereign immunity to this suit under either the law applicable at the time of the challenged conduct, which recognized absolute immunity for sovereigns, or the later-enacted Foreign Sovereign Immunities Act. In particular, the Statement refutes plaintiffs' arguments for a waiver of immunity under the FSIA for a violation of *jus cogens* or exemption from sovereign immunity under the commercial activity exception to the FSIA. The Statement also argues that the complaint must be dismissed because it presents a nonjusticiable political question given the resolution of war claims through the Treaty of Peace with Japan and related

treaties. See also *Digest 2000*, Chapter 8.b.3.; *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001) (Germany did not implicitly waive its sovereign immunity as a result of its violations of *jus cogens* norms in its treatment of slave laborers in Nazi concentration camps) (see *Digest 2000*, Ch.8.b.4). Internal citations to other pleadings in the case have been omitted.

The full text of the Statement of Interest is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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## DISCUSSION

### I. THE GOVERNMENT OF JAPAN IS IMMUNE FROM THE JURISDICTION OF THE UNITED STATES COURTS IN THIS CASE.

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#### B. Under The Law Applicable At The Time Of The Challenged Conduct, Japan Is Entitled To Immunity From Suit.

The conduct at issue in this case occurred between 1932 and 1945. Under the principles of sovereign immunity then in force, Japan is entitled to immunity from suit. Although plaintiffs' arguments address the provisions of the FSIA, the FSIA was not enacted until 1976. Pub. L. No. 94-583, 90 Stat. 2891 (1976).

The United States has argued, and several courts have held, that the FSIA does not apply to conduct preceding the adoption of the restrictive theory of immunity. See *Carl Marks & Co., Inc. v. Union of Soviet Socialist Republics*, 841 F.2d 26, 27 (2d Cir. 1988), *cert. denied*, 487 U.S. 1219 (1988); *Jackson v. People's Republic of China*, 794 F.2d 1490, 1497-98 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987); *Sampson v. Federal Republic of Germany*, 975 F. Supp. 1108, 1115 (N.D. Ill. 1997); *Lin v. Government of Japan*, No. 92-2574, 1994 WL 193948, at \*2 (D.D.C. May 6, 1994); *Djordjevich v. Bundesminister Der Finanzen, Federal Republic of Germany*, 827 F. Supp. 814, 817



(D.D.C. 1993), *aff'd*, 124 F.3d 1309 (D.C. Cir. 1997); *Slade v. United States of Mexico*, 617 F. Supp. 351, 356–57 (D.D.C. 1985), *aff'd*, 790 F.2d 163 (1987). *But cf. Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1170–71 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995) (questioning, without deciding, whether or not application of FSIA to pre-1952 conduct would be impermissibly retroactive). Both the Second and Eleventh Circuits concluded that the FSIA affects the “substantive rights and liabilities” of foreign states by authorizing suits against foreign states that could not have been brought earlier. *See Jackson*, 794 F.2d at 1497–98 (“to give the Act retrospective application to pre-1952 events would interfere with antecedent rights of other sovereigns”); *Carl Marks*, 841 F.2d at 27 (same). *See also* H.R. Rep. No. 94-1487, 94th Cong. 2d Sess., at 33, *reprinted in* 1976 U.S. Code Cong. & Ad. News 6604, 6632 (noting that ninety-day delay in the FSIA’s effective date was “necessary in order to give adequate notice of the act and its detailed provisions to all foreign states”).

Under principles of sovereign immunity that prevailed during the 1940s, Japan is immune from suit. . . . [P]rior to 1952, the Executive Branch and the federal judiciary took the position that “foreign sovereigns and their public property are . . . not . . . amenable to suit in our courts without their consent.” *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 134 (1938). *See also Alfred Dunhill of London*, 425 U.S. at 712 (Tate Letter, noting that the United States previously had followed the “classical or virtually absolute theory of sovereign immunity”).

Moreover, the Executive Branch does not support the exercise of jurisdiction over plaintiffs’ claims against Japan. The Court is not, in this case, left to its own devices to surmise the views of the Executive. *Cf. Verlinden B.V.*, 461 U.S. at 487–88 (noting that, prior to the FSIA, courts were required to discern the likely policy of the Executive Branch in cases in which the State Department made no filing). The United States hereby affirmatively states that, because Japan is entitled to sovereign immunity, the United States opposes the assertion of jurisdiction by United States courts over claims against the Government of Japan concerning the consequences of its actions during World War II.

### C. Under The Applicable Provisions Of The FSIA, The Japanese Government Is Immune From Suit On Plaintiffs' Claims In United States Courts.

Alternately, even looking to the FSIA as the basis for assessing the Court's jurisdiction, Japan is also immune from this suit. . . . [T]he general rule of the FSIA is that "a foreign state shall be immune from the jurisdiction of the courts of the United States," 28 U.S.C. § 1604. The FSIA also provides various exceptions to that rule, 28 U.S.C. § 1605–07, but, absent an applicable exception, U.S. courts lack jurisdiction over the suit. *Nelson*, 507 U.S. at 355; *Amerada Hess*, 488 U.S. at 443. The FSIA provides that:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act, a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1604. The exceptions in sections 1605 through 1607 focus on waiver, commercial activities, U.S. property rights, torts occurring in the United States (subject to exceptions), arbitration, a limited class of acts of international terrorism and certain maritime claims. That argument has been rejected by the District of Columbia Circuit as well as the other courts of appeals that have considered it and should be rejected here as well. Plaintiffs also attempt to rely on the commercial activity exception, but that exception is equally inapplicable here.<sup>3</sup>

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<sup>3</sup> Plaintiffs further argue that Japan explicitly waived sovereign immunity. In support of this position, plaintiffs allege that Japan's consent to the terms of the Potsdam Declaration was an acceptance that it would be held responsible for its actions and therefore a knowing and intentional waiver of its sovereign immunity. However, the Potsdam Declaration does not expressly state that Japan intended to waive its sovereign immunity for suit in the United States, so there is no explicit waiver. *Amerada Hess*, 488 U.S. at 442–43; *Princz*, 26 F.3d at 1175; *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 378 (7th Cir. 1985); *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 720 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993); *Sampson*, 975 F. Supp. at 1119. Moreover, the Potsdam Declaration does not create a private right of action. See *Amerada Hess*, 488 U.S. at 442; *Princz*, 26 F.3d at 1175; *Siderman*, 965 F.2d at 719–20.

**1. Neither The Language Nor The Legislative History Of The FSIA Supports An Expansive Construction Of The Implied Waiver Exception To The Statute.**

There is no general exception to sovereign immunity for violations of international law. The exceptions to sovereign immunity in the FSIA are clear and specific, suggesting that a theory of constructive waiver based on violation of international law would be inconsistent with the intent of the statute to recognize sovereign immunity except in certain limited and identifiable situations.

The Supreme Court in *Amerada Hess* adopted this narrow construction of the exceptions to sovereign immunity. The Court observed that “Congress had violations of international law by foreign states in mind when it enacted the FSIA,” 488 U.S. at 435 (citing in particular section 1605(a)(3)’s denial of immunity when property rights are taken in violation of international law). The Court concluded that, “[f]rom Congress’ decision to deny immunity to foreign states in the class of cases just mentioned, we draw the plain implication that immunity is granted in those cases involving alleged violations of international law that do not come within one of the FSIA’s exceptions.” *Id.* at 436.<sup>4</sup> See also *Nelson*, 507 U.S. at 355.

The Supreme Court’s narrow interpretation is further supported by a subsequent amendment to the FSIA in which Congress abrogated foreign states’ immunity for specific acts of international terrorism. In 1996, the FSIA was amended to create an exception to sovereign immunity for torture, extrajudicial killing, aircraft sabotage and hostage taking, but limited the exception to suits brought by U.S. citizens against foreign governments identified by the Executive Branch as state sponsors of terrorism. Pub.

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Plaintiffs also point to five international treaties existing at the time that prohibited sexual slavery and the trafficking in women and children, although plaintiffs do not argue that Japan waived its sovereign immunity in any of those treaties, was a party to the those treaties, or even violated them.

<sup>4</sup> The Supreme Court also observed that, in passing the FSIA, Congress had invoked its power to punish “Offenses against the Law of Nations,” *Amerada Hess*, 488 U.S. at 436 (citing U.S. Const. Art. I, § 8, cl. 10). The Court took this as further indication that the omission of a general exception for violations of international law was intentional. See *ibid.*

L. No. 104-132, Title II, Subtitle B, § 221(a)(1), 110 Stat. 1214, 1241-42 (1996), adding 28 U.S.C. § 1605(a)(7).<sup>5</sup> Like section 1605(a)(3)'s limited removal of immunity for violations of international law respecting *property* rights, section 1605(a)(7)'s limited exception for *certain* acts of international terrorism by designated states counsels strongly against a broad interpretation of section 1605(a)(1) under which all violations of international law, including those that some consider to be violations of *jus cogens* are construed, *ipso facto*, as implied waivers of immunity. See *Smith v. Socialist People's Libyan Arab Jamahiriya*, 101 F.3d 239, 244 (2d Cir.), *cert. denied*, 520 U.S. 1204 (1997) (noting that section 1605(a)(7) is "a carefully crafted provision that abolishes the defense [of sovereign immunity] only in precisely defined circumstances" and that this is "evidence that Congress is not necessarily averse to permitting some violations of *jus cogens* to be redressed through channels other than suits against foreign states in United States courts").

Courts frequently have observed that the implied waiver provision of section 1605(a)(1) in particular must be construed narrowly. See *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari*, 12 F.3d 317, 325 (2d Cir. 1993), *cert. denied*, 511 U.S. 1069 (1994) (quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1017 (2d Cir. 1991)) ("Federal courts have been virtually unanimous in holding that the implied waiver provision of Section 1605(a)(1) must be construed narrowly"); see also *Smith*, 101 F.3d at 243; *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987), *cert. denied*, 485 U.S. 905 (1988); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985). In support of this conclusion, the courts have cited the limited list of examples given by Congress in the legislative history of the implied waiver provision. Congress specifically referred to three circumstances that would constitute implied waivers—"where a foreign state has agreed to arbitra-

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<sup>5</sup> In amending the FSIA to permit suit for certain enumerated torts abroad by designated state sponsors of terrorism, Congress expressly declined to adopt a broader approach, originally passed by the House. See 142 Cong. Rec. 4570, 4586, 4591-93 (March 13, 1996) (§ 803 of H.R. 2703, as amended); 142 Cong. Rec. 4814-15, 4836, 4846 (March 14, 1996).

tion in another country,” “where a foreign state has agreed that the law of a particular country should govern a contract,” and “where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity.” H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. Although these examples are not exclusive, “courts have been reluctant to stray beyond these examples when considering claims that a nation has implicitly waived its defense of sovereign immunity.” *Frolova*, 761 F.2d at 377; *Princz*, 26 F.3d at 1174 (quoting same); *Drexel Burnham Lambert*, 12 F.3d at 325, and *Shapiro*, 930 F.2d at 1017 (both accepting the notion that “courts have been reluctant to find an implied waiver where the circumstances” of the waiver were ambiguous); *see also Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 989 F.2d 572, 577 (2d Cir. 1993) (a more expansive interpretation of the implied waiver exception would “vastly increase the jurisdiction of the federal courts over matters involving sensitive foreign relations”); *Cargill Intern. S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1017 (2d Cir. 1993); *Foremost-McKesson*, 905 F.2d at 442–44; *Canadian Overseas Ores Ltd. v. Compania de Acero del Pacifico S.A.*, 727 F.2d 274, 276 (2d Cir. 1984).

More particularly, as the Seventh Circuit noted in *Frolova*, the examples listed by Congress reflect that an implied waiver should not be found “without strong evidence that this is what the foreign state intended.” 761 F.2d at 377. *See also id.* at 378 (“waiver would not be found absent a *conscious decision* to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so” (emphasis added)); *Princz*, 26 F.3d at 1174 (“*jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605(a)(1)”); *Drexel Burnham Lambert*, 12 F.3d at 326 (waiver must be “unmistakable” and “unambiguous”). Plaintiffs’ arguments in this case are inconsistent with the intentionality requirement of the implied waiver provision. Whereas Congress has declared that a foreign state designated as a state sponsor of terrorism may forfeit its sovereign immunity when it engages in certain classes of conduct, Congress has not adopted a broad forfeiture of immunity for all alleged violations of *jus cogens*. It is not the role of the courts to do so, and no higher court has ever done so.

In light of the above, it is not surprising that each of the three courts of appeals that has addressed the relationship of *jus cogens* to sovereign immunity has rejected the idea that conduct by a sovereign nation in violation of *jus cogens* norms constitutes an implied waiver of immunity. See *Princz*, 26 F.3d at 1173–74; *Smith*, 101 F.3d at 242–45; *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 718–19 (9th Cir. 1992).

**2. *The D.C. Circuit's Decision In Princz Is Dispositive In Determining That Japan's Alleged Violation Of Jus Cogens Norms Does Not Constitute An Implied Waiver Of Sovereign Immunity.***

*Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1170–71 (D.C. Cir. 1994), is dispositive on the issue of Japan's implied waiver of sovereign immunity due to alleged violations of *jus cogens* principles. In nearly identical circumstances, the D.C. Circuit determined that under the FSIA there was no such implied waiver; that such a waiver would be inconsistent with the requirements of the FSIA; and that there were strong policy considerations against finding such a waiver. Analyzing plaintiffs' contentions under the FSIA (rather than under the doctrine of absolute immunity, which we believe applies here), the *Princz* decision is controlling.

In *Princz*, the D.C. Circuit held that torture and enslavement by the Third Reich did not constitute an implied waiver, even though the court acknowledged that "it is doubtful that any state has ever violated *jus cogens* norms on a scale rivaling that of the Third Reich." 26 F.3d at 1174. The court relied on the Ninth Circuit's statement in *Siderman* that "[t]he fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA." *Id.* (quoting *Siderman*, 965 F.2d at 719). The D.C. Circuit also held that the *jus cogens* implied waiver theory is inconsistent "with the intentionality requirement implicit in § 1605(a)(1)." *Id.* The court concluded that "an implied waiver depends upon the foreign government's having at some point indicated an amenability to suit." *Id.*

Significantly, in addition to the statutory construction reasons for concluding that *jus cogens* violations do not constitute an implied waiver of immunity, the D.C. Circuit in *Princz* observed

that there are strong policy considerations for not expanding jurisdiction of the American courts over foreign governments:

We think that something more nearly express is wanted before we impute to the Congress an intention that the federal courts assume jurisdiction over the countless human rights cases that might well be brought by the victims of all the ruthless military juntas, presidents-for-life, and murderous dictators of the world, from Idi Amin to Mao Zedong. Such an expansive reading of § 1605(a)(1) would likely place an enormous strain not only upon our courts but, more to the immediate point, upon our country's diplomatic relations with any number of foreign nations. In many if not most cases the outlaw regime would no longer even be in power and our Government could have normal relations with the government of the day—unless disrupted by our courts, that is.

*Id.* at 1174–75 n.1.

The policy concerns reflected in *Princz* are particularly acute because of the unsettled character of *jus cogens* (discussed *infra*), and because of the procedural posture in which a claim of implied waiver likely would be presented. As is the case here, plaintiffs of foreign nationality, having no contacts with the United States, might be alleging an implied waiver of sovereign immunity on the basis of purported *jus cogens* violations overseas. The foreign state—perhaps currently a close ally of the United States—potentially could face a default unless it appeared to litigate two very difficult and potentially sensitive issues: (1) whether a particular principle has achieved the status of *jus cogens* under international law, and (2) whether the foreign state has, in fact, violated *jus cogens* (which may require a searching inquiry into the motivation of particular officials). This litigation would take place in a context, unlike other exceptions to sovereign immunity under the FSIA, where no contacts with the United States would be required and where no international precedents would support U.S. assertion of jurisdiction. In such circumstances, it would be especially difficult for the Executive Branch to persuade the foreign state to appear to litigate, contrary to the intent of the FSIA.

Because the D.C. Circuit explicitly held in *Princz* that a foreign sovereign does not waive its immunity by violating *jus cogens* norms, plaintiffs' claim that Japan waived its sovereign immunity must fail here.

**3. *The Jus Cogens Doctrine Does Not Address, And Would Be A Highly Uncertain Guide To, Resolving Sovereign Immunity Issues.***

A further problem in plaintiffs' argument is that *jus cogens* would provide a highly uncertain guide to implementing the FSIA's implied waiver exception. As stated in one of the leading treatises on international law, *jus cogens* "is a comparatively recent development and there is no general agreement as to which rules have this character." See Oppenheim's International Law, ed. by R. Jennings and A. Watts, 9th ed. (1992), p. 7. Further, there is no support in state practice for the proposition that the international consensus required to generate a principle of *jus cogens* necessarily implies a similar consensus that municipal remedies for their violation are either appropriate or mandatory. Indeed, given that no state heretofore has recognized such an exception to sovereign immunity, plaintiffs' theory requires the untenable premise that there can be an international law principle that no state supports.

Accordingly, plaintiffs' argument that a court may decide that a foreign sovereign has violated *jus cogens* and therefore waived sovereign immunity is based on a conceptual confusion concerning substantive and procedural principles of international law, as well as domestic law. Even if *jus cogens* principles are described as non-derogable, that description does not resolve what such principles are or how violations are to be remedied. And, even assuming that all states are bound to respect *jus cogens* principles, they are not required to open their domestic courts to private litigation to resolve alleged *jus cogens* violations of other states. See Reimann, *A Human Rights Exception to Sovereign Immunity: Some Thoughts on Princz*, 16 Mich. J. Int'l L. 403, 421 (1995).

Case law in the United States discussing *jus cogens* is sparse and inconsistent, and commentators frequently note that the content of *jus cogens* is not agreed. See Restatement, § 102, Reporters



Note 6.<sup>6</sup> In most cases, the political branches, which speak for governments in foreign relations, would not have pronounced on the issue whether a certain principle has attained *jus cogens* status. And, since other countries have not adopted a *jus cogens* exception to sovereign immunity, there would be little if any international practice on which to rely. In these circumstances, there is no basis to contend that Congress silently intended the FSIA's implied waiver exception to incorporate violations of *jus cogens*. The determination of what violations of international law will subject a foreign state to the domestic courts of the United States is a foreign policy question that must be reserved for the political branches of government, the Congress and the Executive. See *Princz*, 26 F.3d at 1174–75 n.1.

Appellate decisions other than *Princz* that have addressed the relationship of *jus cogens* to sovereign immunity also have rejected the idea that conduct by a sovereign nation, even though it may violate *jus cogens* norms, constitutes an implied waiver of immu-

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<sup>6</sup> Because of its lack of definition, the concept of *jus cogens* lends itself to extravagant claims such as a right not to be “locally deported” (removed from the city limits). See *Klock v. Cain*, 813 F. Supp. 1430 (C.D. Cal. 1993). See also *Xuncax v. Gramajo*, 886 F. Supp. 162, 189 (D. Mass. 1995) (court was reluctant to stretch asserted *jus cogens* norm against cruel and inhuman or degrading treatment to encompass constructive expulsion); *Sablan v. Superior Court of Commonwealth of Northern Mariana Islands*, No. 91-002, 1991 WL 258344, 2 N.M.I. 165 (N. Mariana Islands 1991) (dissenting opinion) (right of self-government is so fundamental that it constitutes a peremptory norm); see also *Sablan v. Iginoef*, No. 88-366, 1990 WL 291893, 1 N.M.I. 146 (N. Mariana Islands 1990) (concurring opinion) (same); *Borja v. Goodman*, No. 88-394, 1990 WL 291854, 1 N.M.I. 63 (N. Mariana Islands 1990) (same); *Gisbert v. U.S. Attorney General*, 988 F.2d 1437 (5th Cir. 1993) (*jus cogens* does not prohibit the United States from continuing to detain Cubans who arrived with the Mariel “boat lift” in 1980); *Committee Of U.S. Citizens Living In Nicaragua v. Reagan*, 859 F.2d 929, 939–942 (D.C. Cir. 1998) (stating in *dicta* that “genocide, slavery, murder, torture [and] prolonged arbitrary detention” “arguably . . . meet the stringent criteria for *jus cogens*” (emphasis added)); *United States v. Matta-Ballesteros*, 71 F.3d 754, 764 n.5 (9th Cir. 1995), *cert. denied*, 519 U.S. 1118 (1997) (defendant abducted by government agents from Honduras and brought to U.S. for criminal prosecution; court held that kidnapping was not among *jus cogens* norms). These cases illustrate the difficulty that would face the courts in interpreting the FSIA implied waiver exception on the basis of *jus cogens* principles.

nity.<sup>7</sup> In these cases, the courts concluded that it is up to the political branches, and not the judicial branch, to determine whether *jus cogens* violations should give rise to exceptions to foreign sovereign immunity. See *Smith*, 101 F.3d at 245; *Siderman*, 965 F.2d at 719. *Smith* involved Libya's participation in the bombing of Pan Am Flight 103. The court stated that the issue "is not whether an implied waiver derived from a nation's existence is a good idea, but whether an implied waiver of that sort is what Congress contemplated . . . in section 1605(a)(1)." 101 F.3d at 242. The court ultimately rejected the claim that a *jus cogens* violation constitutes an implied waiver under the FSIA, because Congress did not intend that the implied waiver exceptions extend to such circumstances. *Id.* at 245.<sup>8</sup> In *Siderman*, one of the plaintiffs had been kidnapped and tortured by officials of Argentina's government. The court determined that it must construe the FSIA through the prism established by the Supreme Court in *Amerada Hess*, 488 U.S. at 436. 965 F.2d at 719. Accordingly, the court concluded that "if violations of *jus cogens* committed outside the United States are to be exceptions to immunity, Congress must

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<sup>7</sup> This case poses the question whether courts are competent to create new exceptions to sovereign immunity, as distinguished from *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1996), and *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), where the court explored the issue of what conduct constitutes a violation of "the law of nations." In the Alien Tort Statute, 28 U.S.C. § 1350, Congress provided for suits by individual aliens against defendants, other than foreign states. See *Amerada Hess*, 488 U.S. at 436. As construed by the Court, that statute calls upon the courts to determine what types of conduct violate international law and are actionable in U.S. courts. By contrast, the FSIA does not provide for courts to determine whether international law provides new exceptions to sovereign immunity. Indeed, U.S. courts have not, on their own, created exceptions to sovereign immunity.

<sup>8</sup> In *Denegri v. Republic of Chile*, No. 86-3085, 1992 WL 91914, at \*3 (D.D.C. April 6, 1992), the court declined to imply a waiver of foreign sovereign immunity for a violation of peremptory norms. The court assumed that the alleged torture of human rights activists violated a peremptory norm; but it concluded, based on *Amerada Hess*, that Congress did not intend *jus cogens* violations to constitute an implied waiver of immunity under FSIA; see also *Sampson v. Federal Republic of Germany*, 975 F. Supp. 1108, 1123 (N.D. Ill. 1997) (Germany's behavior violated a *jus cogens* norm; but such violation not sufficient to abrogate sovereign immunity under FSIA); *Hirsh v. State of Israel*, 962 F. Supp. 377, (S.D.N.Y.), *aff'd*, 133 F.3d 907 (1997).

make them so. The fact that there has been a violation of *jus cogens* does not confer jurisdiction under the FSIA.” *Id.*

Further, were U.S. courts to establish a new, broad implied waiver doctrine based on an *alleged* violation of international law, the United States could in turn find itself subject to reciprocal denial of sovereign immunity in foreign courts for acts like the U.S.S. Vincennes incident (downing by a United States warship of an Iranian airbus), *see Nejad v. United States*, 724 F. Supp. 753 (C.D. Cal. 1989), or the detention of the Cuban Mariels, *see Garcia-Mir v. Meese*, 788 F.2d 1446 (11th Cir.), *cert. denied*, 479 U.S. 889 (1986).

In such circumstances, it cannot be assumed that foreign judicial systems would operate independently of their political branches as our system does. Thus, if other states were to expand jurisdiction over sovereign nations for alleged *jus cogens* violations, judgments against the United States or other foreign governments might be rendered solely on the basis of prevailing political circumstances rather than on a universal concept of peremptory norms.

#### D. The Actions Complained Of Do Not Come Within The “Commercial Activities” Exception Of The FSIA.

Plaintiffs also contend that Japan’s conduct constitutes a “commercial activity” falling within that exception under the FSIA. That exception is not applicable to these circumstances. The FSIA provides an exception from immunity:

in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605(a)(2). The FSIA defines “commercial activity” as “either a regular course of commercial conduct or a particular commercial transaction or act,” and states that “[t]he

commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d).

The conduct of Japan complained of here does not constitute “commercial activity.” Japan’s acts were those of a sovereign and not those of a private player within a market. A government which uses its police power to effect “[w]idespread abduction by force or coercion of thousands of women into sexual slavery” resulting in the establishment of “comfort houses” to serve its military during war, is not engaging in the type of activity generally performed by individual commercial entities. While the suffering experienced by plaintiffs was horrific, the actions of the Japanese military, although abhorrent, were not commercial and were not actions that could be undertaken by private parties.

In *Nelson*, the Supreme Court, applying the distinction between a state’s public acts (*jure imperii*) and its private or commercial acts (*jure gestionis*), held that a foreign state engages in “commercial activity” where “it exercises ‘only those powers that can also be exercised by private citizens,’ as distinct from those ‘powers peculiar to sovereigns.’” 507 U.S. at 360 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)); *Princz*, 26 F.3d at 1172. Thus, a foreign government engages in “commercial activity” when it “acts, not as regulator of a market, but in the manner of a private player within it” *Weltover*, 504 U.S. at 614. The Court also clarified the statutory directive that courts examine the “nature” of the transaction rather than its “purpose,” stating that “the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in ‘trade and traffic or commerce.’” *Nelson*, 507 U.S. at 360–61 (quoting *Weltover*, 504 U.S. at 614 (emphasis in original)); *Princz*, 26 F.3d at 1172; see also H.R. Rep. No. 94-1487, *supra*, at 16, reprinted in 1976 U.S.C.C.A.N. at 6615.

According to plaintiffs’ complaint, the “comfort women” stations were operated by the Japanese Government for the benefit of Japanese soldiers serving in occupied territories. The “comfort women” were kidnapped, tricked or coerced into service by the Japanese military. The women were held against their will by the Japanese military and forced to perform sexual acts. These actions

do not represent “a regular course of commercial conduct.” 28 U.S.C. § 1603(d). These activities were sovereign in nature. *See Nelson*, 507 U.S. at 363 (the “powers allegedly abused were those of police and penal officers,” not the sort of activity exercised by private parties); *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167–68 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1078 (1995); *De Letelier v. Republic of Chile*, 748 F. 2d 790, 797 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1379 (5th Cir. 1980); *Doe v. Unocal Corp.*, 963 F. Supp. 880, 888 (C.D. Cal. 1997); *see also Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988) (“Even if a transaction is partly commercial, jurisdiction will not obtain if the cause of action is based on sovereign activity”). Japan’s treatment of plaintiffs was an abuse of its military power, but “[h]owever monstrous such abuse undoubtedly may be, a foreign state’s exercise of that power has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature.” *Nelson*, 507 U.S. at 361.

## II. PLAINTIFFS’ COMPLAINT PRESENTS A NONJUSTICIABLE POLITICAL QUESTION.

Plaintiffs’ complaint also must be dismissed because it presents a nonjusticiable political question. Courts may not adjudicate cases whose resolution would entail the determination of a political question. *See, e.g., Baker v. Carr*, 369 U.S. 186, 210 (1962); *Chicago & Southern Air Lines, Inc. v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948); *Coleman v. Miller*, 307 U.S. 433, 454–55 (1939); *Marbury v. Madison*, 5 U.S. 137, 165–66 (1803). Under the political question doctrine, courts dismiss as nonjusticiable cases which would require the judiciary to involve itself in policy choices in areas that have been constitutionally committed to the political branches. In *Baker v. Carr*, the Supreme Court identified six hallmarks of a nonjusticiable case. 369 U.S. at 217 (outlining the criteria for what constitutes a non-justiciable political question); *see also Nixon v. United States*, 506 U.S. 224, 228 (1993); *United States v. Rostenkowski*, 59 F.3d 1291, 1304 (D.C. Cir. 1995). Any one of these characteristics may be sufficient to preclude judicial

review. *Baker*, 369 U.S. at 217; *Aktepe v. United States*, 105 F.3d 1400, 1402–03 (11th Cir. 1997), *cert. denied*, 522 U.S. 1045 (1998).

In his concurrence in *Goldwater v. Carter*, 444 U.S. 996, 998 (1979), Justice Powell summed up the *Baker* criteria into three inquiries: “(i) Does the issue involve resolution of questions committed by the text of the Constitution to a coordinate branch of Government? (ii) Would resolution of the question demand that a court move beyond areas of judicial expertise? (iii) Do prudential considerations counsel against judicial intervention?” The answers to each of those questions demonstrate that plaintiffs here have presented a nonjusticiable political question. *See also Antolok v. United States*, 873 F.2d 369, 381 (D.C. Cir. 1989).

The instant lawsuit presents stark separation of powers difficulties. Determining whether, and how, to assert the claims of their citizens against foreign states is properly the role of the government—in this case the governments of China, the Philippines, and North and South Korea. Consideration of plaintiffs’ claims would require U.S. courts to pass on the sufficiency of these countries’ agreements with Japan and their reasons for entering those agreements. Japan has entered into, or is in the process of negotiating, war-claims settlement and/or peace agreements with China and the two Koreas that emerged after WWII. The United States supported those agreements and negotiations. United States courts are not the appropriate forums to judge the policy considerations underlying the drafting, negotiation and ratification of the 1951 Treaty of Peace with Japan and the successive war claims agreements consummated between Japan and third countries pursuant to that Treaty.

#### **A. The Treaty Of Peace With Japan And Related Treaties Establish A Framework For The Resolution Of War Claims Against Japan.**

This lawsuit cannot be addressed in a vacuum, distinct from the complex historical matrix from which it arises. The plaintiffs in this case are of at least three different nationalities, Filipino, Chinese, and Korean. The history of Japan’s war claims settle-

ments with the United States and its allies, including the Philippines, and various Chinese and Korean political entities is complex, and some context is appropriate. The framework established by those treaties was intended to resolve completely claims against Japan arising out of World War II.

The 1951 Treaty of Peace with Japan, 3 U.S.T. 3169, provided, among other things, for the end of the U.S. Occupation, a return of Japan to the family of nations, and payment by Japan (through the asset-seizure mechanism) for damages caused by wartime aggression. Although unequivocally requiring Japan to compensate Allied nations for war losses, the Peace Treaty recognized that full payment for all damages was impossible if a “viable economy” were to be created in Japan. *See* Peace Treaty, Art. 14(a) (Exhibit 1); S. Exec. Rep. No. 82-2, at 12 (1952) (Exhibit 2).

Under the Treaty, the Government of Japan gave up the use of property and other assets held by Japanese nationals outside of Japan to satisfy war claims. The seizure and eventual liquidation of Japanese assets was legitimized in Article 14(a)(2) of the Peace Treaty. Pursuant to that Article and Article 16 of the Treaty, assets located in Allied territory valued at approximately \$4 billion were confiscated by Allied governments, and their proceeds distributed to Allied nationals in accordance with domestic legislation. *See* Comments on British Draft, Memorandum by the Officer in Charge of Economic Affairs in the Office of Northeast Asian Affairs (Hemmendinger) to the Deputy to the Consultant (Allison), April 24, 1951, *reprinted in* Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 1016 (1977) (Exhibit 3). In return, under Article 14(b) of the 1951 Peace Treaty, the United States and the Allies agreed to “waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war.”<sup>9</sup>

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<sup>9</sup> Several lawsuits were filed in California courts by plaintiffs seeking to recover from defendant Japanese companies damages for back wages and injuries allegedly suffered as prisoners of war during WW II under Cal. Code of Civ. Pro. 354.6. The court granted defendants’ motion to dismiss the claims of the Allied prisoners of War under the Treaty of Peace with Japan because “[o]n its face, the treaty waives ‘all’ reparations and ‘other claims’ of the ‘nationals’ of Allied powers ‘arising out of any actions taken

In a unanimously favorable report on the Treaty, the Senate Committee on Foreign Relations expressly recorded its decision that “the reparations provisions of the Treaty are eminently fair,” and that it “is the duty and responsibility of each government to provide such compensation for persons under its protection as that government deems fair and equitable, such compensation to be paid out of reparations that may be received from Japan or from other sources.” S. Exec. Rep. No. 82-2, at 12–13 (Ex. 2). Consistent with the United States’ “duty and responsibility” to provide such “compensation for persons under its protection as it deems fair and equitable,” *id.*, Congress amended the War Claims Act of 1948, 50 U.S.C. App. §§ 2001–2017 (1994), to afford compensation to victims of Japan during WWII. 50 U.S.C. App. § 2005(d) (1994).<sup>10</sup>

The Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10. 98 Cong. Rec. 2594 (1952). The Treaty was considered as part of a package with three additional security treaties relating to the Pacific region, reflecting the United States’ view of the Treaty as an integral part of its political and foreign relations goals in that region. *See, e.g.*, 98 Cong. Rec. 2327, 2361, 2450, 2462 (1952).

The participation of other nations in the Treaty, and in particular the resolution of claims arising from Japan’s actions during the World War II, was strongly influenced by the geopolitical situation in East Asia. The Philippines was a party to the Treaty. Because the Philippines signed and ratified the Peace Treaty, any wartime claims of Philippine nationals against Japan have been expressly waived by Article 14(b) of the Treaty, including those claims at issue here. As a result of political complications, China

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by Japan and its nationals during the course of the prosecution of the war.” *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 945 (N.D. Cal. 2000).

<sup>10</sup> A proposal that would have allowed federal courts to adjudicate war compensation claims was rejected because of the complexity of the issues and the need to have the claims “classified by experts who are qualified so to do” in order to “get some rationality out of this situation [and] to determine the categories of claims that should be allowed.” 94 Cong. Rec. 564 (1948). There can be no doubt that Congress did not want claims within the Commission’s jurisdiction to be adjudicated by the courts, because it barred even judicial review of the Commission’s decisions “by mandamus or otherwise.” 50 U.S.C. App. § 2010 (1994).



and Korea did not become party to the 1951 Treaty.<sup>11</sup> Consequently, Article 14(b) of the Treaty, providing for waiver of all Allied claims against Japan and its nationals, does not cover the PRC, Taiwan, or North or South Korea. However, the Allies inserted several provisions into the Treaty that provided for some form of compensation to these countries. Other articles of the Treaty obligated Japan to enter into bilateral agreements with China and Korea on terms similar to those provided in the Treaty. In this manner, the Allies established a comprehensive framework for the disposition of war claims.

Article 26 of the Treaty, for example, obligated Japan to enter into a war-claims settlement with a Chinese political entity (without specifying which Chinese entity) within three years. Article 21 of the Treaty stated that China would be entitled to the benefits of Articles 10 and 14(a). In Article 10, Japan renounced all rights and interests in China, and Article 14(a) provided for the seizure and liquidation of assets located in Chinese territory. This was extremely significant because almost half of all Japanese-owned assets abroad were located in China.

Within three years, Japan concluded a bilateral treaty of peace with the "Republic of China" (Taiwan), on substantially the same terms as are provided for in the 1951 Treaty. *See Treaty of Peace Between the Republic of China and Japan, April 28, 1952, 1858*

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<sup>11</sup> China presented the biggest obstacle to a comprehensive settlement, since by 1949 there was strong international disagreement over which political entity legally represented China: the People's Republic of China ("PRC") in Beijing or Chiang Kai-Shek's Nationalist forces on Taiwan ("the Republic of China"). *See Memorandum of Conversation, by the Deputy Director of the British Commonwealth and Northern European Affairs (Satterthwaite), Washington, March 30, 1951, reprinted in Foreign Relations of the United States 1951, Vol. VI, Asia and the Pacific, at 953-54 (1977) (Exhibit 4).* The U.S. Government continued strongly to support the Chinese Nationalists. Great Britain, by contrast, favored recognition of the People's Republic of China.

Korea presented a different but equally complicated set of problems. As Korea had been under the colonial occupation of Japan since 1910, "the view of the United States and Japanese governments was that . . . Korea had fought against the Allies during the Pacific War and therefore was not eligible for reparations." *See U.S. Dep't of State Publications, Record of Proceedings of the Conference for the Conclusion and Signature of the Treaty of Peace with Japan, 84 (1951) (Exhibit 5).* Korea nevertheless was recognized as having "a special claim on Allied consideration." *Id.*

U.N.T.S. 38 (Exhibit 6). The situation with regard to the People's Republic of China is more complicated. In the wake of President Nixon's "opening" to the People's Republic of China, Japan sought to normalize relations. Japan and the PRC, while not signing a formal peace treaty, agreed to a "Joint Communiqué" which terminated the "abnormal state of affairs that ha[d] hitherto existed between Japan and the People's Republic of China." Joint Communiqué of the Government of Japan and the Government of the People's Republic of China, Art. 1 (Exhibit 7). In the Joint Communiqué, the PRC renounced its demand for war reparations from Japan. *Id.*, Art. 5. The Treaty of Peace and Friendship between China and Japan incorporated and formalized the terms of the Joint Communiqué. August 12, 1978, 1978 U.N.T.S. 269 (Exhibit 8).

Korea also received benefits under Article 21 of the Treaty, and its independence was recognized under Article 2. Article 4(a) obligated Japan to resolve all claims between Korea and Japan through "special arrangements between the two governments," and Article 4(b) provided for the Korean Government's seizure of all Japanese-owned assets in Korea. This was a significant step towards the resolution of Korean claims as these assets were, by all accounts, substantial. By the end of World War II, Japan and its nationals had acquired 5 billion dollars' worth of assets in Korea, almost 85 percent of all property in Korea. *See* Sung-Hwa Cheong, *The Politics of Anti-Japanese Sentiment in Korea: Japanese-South Korean Relations under American Occupation, 1945–1952*, 48 (1991).

Japan and the Republic of Korea (South Korea) entered into an agreement as contemplated in Article 4(a) of the Treaty in 1965 following years of protracted negotiations in which the United States was heavily involved. *See* Agreement on the Settlement of Problems Concerning Property and Claims and On Economic Cooperation Between Japan and the Republic of Korea, June 22, 1965, 8473 U.N.T.S. 258 (Exhibit 9); *see also generally* Cheong, *supra*, at 99–118 (discussing U.S. role in the negotiations). The terms of this agreement were greatly influenced by the fact that Korea already had received substantial compensation under Article 4(b) of the 1951 Treaty, as discussed above. Cheong, *supra*, at 117. The Japan-ROK agreement is part and parcel of the framework created by the United States and its allies in 1951. A similar agreement between Japan and North Korea is currently under

negotiation, in furtherance of Japan's obligations under Article 4(a) of the 1951 Treaty.

Thus, although Article 14(b) of the Treaty did not extinguish claims of nationals of countries not party to the Treaty, the text and negotiating history of the Treaty demonstrates that it was intended to completely resolve war claims against Japan and its nationals. *See In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d 939, 946 (N.D. Cal. 2000); *Tenney v. Mitsui & Co., Ltd.*, Case No. CV-99-11545, slip op. at 4–5 (C.D. Cal. Feb. 24, 2000) (J. Marshall) (Exhibit 10).

**B. The Court Must Defer To The Judgment Of The Executive And Legislative Branches In The Resolution Of War-Related Claims Against Japan, As Reflected In The 1951 Peace Treaty.**

The United States Senate gave its advice and consent to the Treaty on March 20, 1952, by a vote of 66 to 10. In entering into the Treaty, it manifestly was not the intent of the President and Congress to preclude Americans from bringing their war-related claims against Japan and Japanese nationals in U.S. courts, while allowing federal or state courts to serve as a venue for the litigation of similar claims by non-U.S. nationals. Regardless of what arrangements Korea and China have with Japan, it would be inconsistent with the framework and intent of the 1951 Treaty for their claims to be litigated in U.S. courts.

The 1951 Treaty created the international framework for bringing closure to World War II claims against Japan and its nationals. In drafting the Treaty, the Allies took pains not only to address settlement of their own war-related claims with Japan, but those of non-party nations as well. As discussed above, the Allies inserted several provisions into the Treaty that provided for some form of compensation to those countries. *See Treaty*, Arts. 2, 4, 10, 14 and 21 (Ex. 1). In addition, the Treaty obligated Japan to enter into bilateral agreements with those entities on terms similar to those provided in the Treaty. *Id.*, Arts. 4 and 26. The Allies' intent was to effect as complete and lasting a peace with Japan as possible by closing the door on the litigation of war-related claims, and instead effecting the resolution of those

claims through political means. This policy decision was made in order to allow Japan as a nation to rebuild its economy and become a stable force and strong ally in Asia. *See In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 946–47; S. Exec. Rep. No. 82-2, at 2–3 (Ex. 2); *Aldrich v. Mitsui & Co. (USA)*, Case No. 87-912-Civ-J-12, slip op. at 3 (M.D. Fla. Jan. 20, 1988) (Exhibit 11). To that end, the United States actively facilitated and encouraged Japan’s efforts to enter into peace treaties and/or claims settlement agreements with non-signatory nations such as China, Korea, Burma and Indonesia.

An assertion of jurisdiction by this Court would fail to give appropriate deference to the policy established by the Executive and Congress and would be at odds with established precedents. Foreign relations in general—and matters of war and peace in particular—frequently present political questions. *U.S. v. Belmont*, 301 U.S. 342, 328 (1937). Under the Constitution, the conduct of American diplomatic and foreign affairs is entrusted to the political branches of the federal government. *See, e.g., Haig v. Agee*, 453 U.S. 280, 292 (1981); *Chicago & Southern Air Lines*, 333 U.S. at 111; *United States v. Pink*, 315 U.S. 203, 222–23 (1942); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Oetjen v. Central Leather Co.*, 246 U.S. 297, 302 (1918). As articulated by the Court in *Baker v. Carr*, 369 U.S. at 217, there is a “textually demonstrable constitutional commitment” of U.S. diplomacy and foreign policy to the political branches of the government.<sup>12</sup> Indeed, as the Supreme Court has observed, matters

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<sup>12</sup> The President and Congress both have constitutional authority with respect to the Nation’s foreign affairs. The President is the Nation’s “guiding organ in the conduct of our foreign affairs,” in whom the Constitution vests “vast powers in relation to the outside world.” *Ludecke v. Watkins*, 335 U.S. 160, 173 (1948). The President’s power flows from his positions as Chief Executive, U.S. Const. art. II, § 1, cl. 1, and Commander in Chief, *id.* art. II, § 2, cl. 1. *See Chicago & Southern Air Lines*, 333 U.S. at 109. In particular, the Constitution grants the President the specific power to “make Treaties” with the advice and consent of two-thirds of the Senators present, U.S. Const. art. II, § 2, cl. 2. Congress has the power to declare war, U.S. Const. art. I, § 8, cl. 11; and broad power to regulate commerce with foreign nations, *id.* art. I, § 8, cl. 3. And, as noted above, the Senate provides its advice and consent with regard to treaties. *Id.* art. II, § 2, cl. 2. It is clear from the text of the Constitution that the power

vitality and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference.

*Harisiades v. Shaughnessy*, 342 U.S. 580, 588–89 (1952); *see also* *Luftig v. McNamara*, 373 F.2d 664, 665–66 (D.C. Cir.), *cert. denied*, 387 U.S. 945 (1967); *Z & F Assets Realization Corp. v. Hull*, 114 F.2d 464, (D.C. Cir. 1940), *aff'd*, 311 U.S. 470 (1941). Thus, the Judiciary’s refusal to review foreign policy decisions—in this case the policy reflected in the 1951 Treaty—properly shows deference to the responsibilities committed to the political branches under the Constitution, as well as the practical limitations on the role of the Judiciary. *Chicago & Southern Air Lines*, 333 U.S. at 111; *see also* *Antolok*, 873 F.2d at 381 (“nowhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary, in any fashion in the making of international agreements”); *Ange v. Bush*, 752 F. Supp. 509, 512 (D.D.C. 1990) (“the Constitution grants operational powers only to the two political branches . . . where decisions are made based on political and policy considerations. The far-reaching ramifications of those decisions should fall upon the shoulders of those elected by the people to make those decisions”).

The Court should not second guess the difficult and sensitive foreign policy judgments made by the United States and the other Allied governments in the wake of World War II. *See Chicago & Southern Air Lines*, 333 U.S. at 111; *Aktepe*, 105 F.3d at 1403–04; *Ange*, 752 F. Supp. at 515.

### C. Resolution of Plaintiffs’ Claims Would Require The Court To Move Beyond Areas Of Judicial Expertise.

Resolution of the plaintiffs’ claims also would demand that a court move beyond areas of judicial expertise. Plaintiffs’ claims involve issues for which there are no judicially manageable standards. Consideration of plaintiffs’ allegations necessarily would

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over foreign affairs and foreign commerce lies exclusively with the Executive and Legislative Branches.

put the Court in the position of judging the reasonableness of agreements entered into between other foreign governments, such as Japan and China or Korea, and the effects of those agreements on the rights of their citizens with respect to events occurring outside the United States. *Belmont*, 301 U.S. at 328. Under international law, governments decide how to address the claims of their own nationals—whether to put them forward and whether and how to settle them. See L. Henkin, *Foreign Affairs and the Constitution* 299–300 (1972). The plaintiffs’ governments, China, Korea and the Philippines, as well as the authorities on Taiwan, chose to resolve those claims through international agreements with Japan. The decisions of those governments as reflected in those agreements are not susceptible of analysis by U.S. courts.

While both political branches maintain certain authority in foreign relations and in war-making, “the judicial branch, on the other hand, is neither equipped nor empowered to intrude” into this realm. *Ange*, 752 F. Supp. at 512. The judgments required in foreign affairs “are delicate, complex, and involve large amounts of prophecy,” and therefore should “be undertaken only by those directly responsible to the people whose welfare they advance or imperil.” *Id.* (citing *Chicago & Southern Air Lines*, 333 U.S. at 111); see also *More v. Intelcom Support Services, Inc.*, 960 F.2d 466, 472 (5th Cir. 1992) (while “courts are well equipped to resolve questions of domestic law,” they “venture into unfamiliar territory when interpreting . . . treaties negotiated with foreign governments”); *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981) (Meddling with the decision making of the political branches “extends judicial power beyond the limits inherent in the constitutional scheme for dividing federal power” (citations omitted)).

The Supreme Court has recognized not only “the limits of [its] own capacity to ‘determine precisely when foreign nations will be offended by particular acts’ . . . but consistently acknowledged that the ‘nuances’ of ‘the foreign policy of the United States . . . are much more the province of the Executive Branch and Congress than of [the] Court.’” *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 386 (2000) (internal citations omitted); see also *Harisiades*, 342 U.S. at 588–89; *Regan v. Wald*, 468 U.S. 222, 242 (1984).

United States courts should not be placed in the position of judging the wisdom behind agreements entered into between two foreign governments, such as Japan and China or Korea, on the rights of their citizens with respect to events occurring outside the United States, or attempting to analyze those agreements. Courts as a general matter do not consider themselves competent to resolve such matters. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423–25 (1964); *Kelberine v. Societe Internationale, Etc.*, 363 F.2d 989, 995 (D.C. Cir. 1965), *cert. denied*, 385 U.S. 1044 (1967); *Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum Laden Aboard Tanker Dauntless Colocotronis*, 577 F.2d 1196, 1204–05 (5th Cir. 1978), *cert. denied*, 442 U.S. 928 (1979). These are matters to be decided through negotiation among the governments involved, not in a United States’ courtroom.

#### D. Prudential Considerations Counsel Against Judicial Intervention.

Prudential considerations also counsel against review of plaintiffs’ claims. First, on matters of international relations, the United States needs to speak with one voice. *See Antolok*, 873 F.2d 384. Second, this case presents “an unusual need for unquestioning adherence to a political decision already made.” *Baker*, 369 U.S. at 217. Finally, the respect due the political branches, in addition to all the other factors discussed above, weighs in favor of finding this case nonjusticiable.

Judicial review of plaintiffs’ claims against Japan would frustrate the policy established by the 1951 Peace Treaty of fostering resolution of all war claims against Japan by state-to-state negotiations, a policy that has been in effect for over half a century. The United States was the driving force behind the decision to waive all Allied claims against Japan in the 1951 Treaty. It did so to fulfill fundamental U.S. foreign policy and national security goals. The Peace Treaty, along with a bilateral security agreement the United States entered into with Japan on the same day the Peace Treaty was signed, forms the basis of U.S.-Japan relations, and has been the very cornerstone of our country’s foreign policy and regional security in East Asia and the Pacific. A decision

to allow these claims to proceed in the face of the Peace Treaty and other governments' agreements with Japan effectively would undo that foreign policy, which has benefitted the entire country for the last 50 years, by reopening claims that have long since been resolved.

In Article 14 of the 1951 Treaty, the United States expressly waived—on behalf of themselves and its nationals—claims arising out of actions taken by Japan and its nationals during the war, thereby closing the doors of U.S. courts to such claims. This decision by the federal government is entitled to substantial deference because, “when foreign affairs are involved, the national interest has to be expressed through a single authoritative voice.” See *United States v. Li*, 206 F.3d 56, 67 (1st Cir.) (Selya, J., concurring), *cert. denied*, 121 S. Ct. 379 (2000); *Curtiss-Wright Export Corp.*, 299 U.S. at 320; *accord Department of Navy v. Egan*, 484 U.S. 518, 529 (1988); *Agee*, 453 U.S. at 293–94; *Alfred Dunhill of London, Inc.*, 425 U.S. at 705–06 n.18. The necessity that the United States speak with one strong voice is especially critical in complex and delicate circumstances such as one involving an international peace treaty. See *DKT Memorial Fund LTD v. Agency for International Development*, 887 F.2d 275, 291 (D.C. Cir. 1989) (area of “foreign affairs” is where “the Executive receives its greatest deference, and in which we must recognize the necessity for the nation to speak with a single voice”).

The 1951 Treaty of Peace with Japan created a basic framework for the non-judicial resolution of war claims that, for nearly half a century, has been adhered to by all states with war-related claims against Japan. The unambiguous purpose of this process was “to settle the reparations issue *once and for all*” because “it was well understood that leaving open the possibility of future claims would be an unacceptable impediment to a lasting peace.” *In re World War II Era Japanese Forced Labor Litigation*, 114 F. Supp. 2d at 946 (emphasis added). The litigation of these claims in U.S. court would be inconsistent with the United States' objective of achieving finality on the issue of war-related claims.<sup>13</sup> It

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<sup>13</sup> As the U.S. Supreme Court has instructed, the United States' interpretation of the Peace Treaty is entitled to “great weight.” See *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (“While courts interpret treaties for themselves, the meaning given them by the departments of government par-



also could have serious implications for stability in the region. The Japanese Government has stated that its relationships with China and Korea are very delicate and that such lawsuits could disrupt relations and ongoing negotiations with those countries. See Memorandum in Support of Motion of Government of Japan to Dismiss Complaint at pp. 1, 27.

Finally, a Court decision to allow these claims to proceed would create the very “multifarious pronouncements” about America’s actions overseas that *Baker v. Carr* commands the Court to avoid. 369 U.S. at 217. Rather than bringing closure on war claims against Japan and its nationals—the purpose of the 1951 Treaty—litigation of these claims would throw open a case-by-case adjudication of war-related claims. If individual plaintiffs were allowed to impose their interpretation of the Treaty on a piece-meal basis through litigation, this would have a potentially serious negative impact on U.S.-Japan relations. It also could affect United States treaty relations globally by calling into question the finality of U.S. commitments.

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### 3. Retroactivity of FSIA

In *Altmann v. Republic of Austria*, 142 F.Supp.2d 1187 (C.D. Cal. 2001), the FSIA was held to apply retroactively to events occurring prior to its adoption in 1976 as well as prior to 1952 when the restrictive theory of sovereign immunity was adopted by the United States pursuant to the “Tate Letter.” Before 1952, foreign states were absolutely immune from suit in U.S. courts. Prior decisions of U.S. courts had been to the contrary, see, e.g., *Jackson v. People’s Republic of China*, 794 F.2d 1490 (11th Cir. 1986), cert. denied, 480 U.S. 917 (1987); *Carl Marks & Co. v. Union of Soviet Socialist Republics*, 841 F.2d 26 (2nd Cir. 1988), cert. denied, 487 U.S. 1219 (1988). After the U.S. Supreme Court’s decision in *Landraf v. USI Film Products*, 511 U.S. 244 (1994), skepticism was expressed as to this view. See *Princz v. Federal Republic of Germany*, 26

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ticularly charged with their negotiation and enforcement is given great weight”); *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (same).

F.3d 1166 (D.Cir. 1994), *cert. denied*, 513 U.S. 1121 (1995) (suggesting in dictum that FSIA is retroactive).

#### **4. Exceptions to Immunity**

##### **a. Expropriation**

Applying the FSIA's expropriation exception, § 1605(a)(3), a federal district court held that the Republic of Austria was not immune from claims seeking recovery of various paintings which had been taken in violation of international law in the early 1940's in Nazi-occupied Austria and which subsequently came into the possession of the Republic of Austria. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187 (C.D. Cal. 2001).

##### **b. Arbitration agreement and award**

In 1988, Congress amended the FSIA to provide that a party may bring an action to confirm an arbitral award made pursuant to an agreement to arbitrate between a sovereign state and a private party if the award is or may be governed by a treaty or other international agreement in force in the United States calling for the recognition and enforcement of arbitral awards. 28 U.S.C. § 1605(a)(6). The 1958 UN Convention on the Recognition and Enforcement of Arbitral Awards (the "New York Convention"), 21 U.S.T. 2517, TIAS No. 6997, is such a treaty; it has been implemented for purposes of U.S. law by Chapter Two of the Federal Arbitration Act, 9 U.S.C. § 201 *et seq.*

In *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 158 F. Supp. 2d 377 (S.D.N.Y. 2001), the federal district court considered the applicability of the doctrine of *forum non conveniens* to an action to enforce an arbitral award against the State of Ukraine and a Ukrainian company. In granting the respondents' motion to dismiss, the court stated as follows:

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This Court finds nothing to suggest that the FSIA affects the federal judiciary's inherent power to decline jurisdiction over complex and inconvenient lawsuits brought in the United States which implicate foreign parties only; require the application of foreign law; and entail no contacts with the interests of the United States. To the contrary, application of the doctrine of forum non conveniens —when appropriate in such cases—may promote the notion of comity upon which the FSIA is grounded. . . . Although the arbitration exception does not include language that an action must have some connection to the United States, there is no reason to treat it any differently from the waiver exception. *Id.* at 381, 384.

**c. Acts of terrorism**

In 1996, the FSIA was amended to provide a cause of action where “money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such an act or provision engaged in by an official, employee or agent of such foreign state while acting within the scope of his or her office, employment or agency. . . .” 28 U.S.C. § 1605(a)(7). Such liability may include economic damages, solatium, pain and suffering, and punitive damages. (*See also Digest 2000*, Chapter 8.B.4. and 5.)

In *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27 (D.D.C. 2001), the federal district court held that the Islamic Republic of Iran and its Ministry of Information and Security were not immune from entry of a default judgment and award of damages in a suit brought by the estate of a Jesuit priest who had been abducted, imprisoned and tortured in Beirut by members of Hizbollah. The court found that the IRI and the MOIS had provided material support and resources to Hizbollah within the meaning of § 1605(a)(7). *See also Sutherland v. Islamic Republic of Iran*, 151 F. Supp. 2d 27 (D.D.C.2001) (American university professor held hostage and tortured in Lebanon awarded judgment under this exemption.); and *Wagner v. Islamic Republic of Iran*, 172 F. Supp. 2d 128 (D.D.C. 2001), (suicide bombing of US Embassy

in Beirut qualified as extrajudicial killing for purposes of § 1605(a)(7).

On August 17, 2001, in *Roeder v. Iran*, No. 00-3110 (EGS) (D.D.C. Aug. 17, 2001), the U.S. District Court for the District of Columbia issued an Order and Default Judgment granting claims by former hostages held in Tehran from 1979 to 1981 and scheduling a damages hearing for October 15, 2001. The Department of State first learned of the litigation during the week of September 17, 2001, when the docket number of the case was specifically referenced in draft legislation the Department had been asked to review. The U.S. Government filed motions on October 12, 2001, seeking to intervene and moving to vacate the default judgment and to dismiss plaintiffs' claims on the merits. Plaintiffs had asserted that 28 U.S.C. § 1605(a)(7), and the so-called "Flatow Amendment" (section 589 of the Foreign Operations, Export Financing and Related Programs Appropriations Act, 1997, P.L. No. 104-208)<sup>1</sup> provided a basis for their suit.

In its October 12 Memorandum of Points and Authorities in Support of the United States Motion to Vacate Default Judgment and Dismiss Plaintiffs' Claims, the United States argued, among other things, that the suit must be dismissed because it was contrary to U.S. obligations in the General Declaration to the Algiers Accords, described in 8.A.1. *supra*. The terms of the Accords, which plaintiffs had not brought to the attention of the court,

bar and preclude the prosecution against Iran of any pending or future claim of . . . a United States national

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<sup>1</sup> Section 589(a) provides that:

an official, employee, or agent of a foreign state designated as a state sponsor of terrorism designated under section 6(j) of the Export Administration Act of 1979 while acting within the scope of his or her office, employment, or agency shall be liable to a United States national or the national's legal representative for personal injury or death caused by acts of that official, employee, or agent for which the courts of the United States may maintain jurisdiction under section 1605(a)(7) of title 28, United States Code, for money damages which may include economic damages, solatium, pain, and suffering, and punitive damages if the acts were among those described in section 1605(a)(7).

arising out of events . . . related to (A) the seizure of the 52 United States nationals on November 4, 1979, [or] (B) their subsequent detention. . . .

General Declaration, ¶ 11, 20 I.L.M. at 227. The United States noted that in seeking to intervene,

the [U.S.] government is not acting on behalf of Iran, or condoning the acts that brought this lawsuit about. The United States condemns to this day the illegal seizure of the hostages and their subsequent mistreatment in the strongest possible terms, and believes that the government of Iran should accept responsibility for its role in these events. But to win the hostages' freedom in 1981, the United States committed itself under the Algiers Accords to "bar and preclude the prosecution against Iran of any pending *or future* claims' by U.S. nationals relating to the hostages' seizure and subsequent detention. . . . The government is therefore obligated to bring about the termination of these proceedings as soon as practicable . . . to uphold its obligations under a binding international agreement.

The U.S. argued further that the claims were barred by Iran's sovereign immunity under the Foreign Sovereign Immunities Act of 1976. It also pointed out that the Flatow amendment provides a cause of action only against "an official, employee, or agent of a foreign state" and thus provides no basis for a claim against the Government of Iran.

Previous suits brought by the hostages, seeking redress against Iran for injuries suffered as a result of their seizure and detention, had already been dismissed on grounds of sovereign immunity. *Persinger v. Islamic Republic of Iran*, 729 F.2d 835 (D.C. Cir. 1984); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582 (9th Cir. 1983); *Ledgerwood v. State of Iran*, 617 F. Supp. 311 (D.D.C. 1985). The decision in *Persinger* also noted that the Court of Appeals initially issued an opinion holding that the President, pursuant to the Algiers Accords, "had lawfully and effectively extinguished [the hostages'] claims against Iran"). *Persinger*, 729 F.2d at 836-37.

The United States argued further that the 1996 exception to the FSIA did not apply to the Roeder claims because Iran had not been designated as a state sponsor of terrorism when the acts giving rise to the claims occurred, nor had it been so designated as a result of those acts. In apparent reaction to the U.S. argument concerning the circumstances of Iran's designation as a state sponsor of terrorism and the applicability of the FSIA amendments, section 626(c) of the Commerce, Justice, State Appropriations Act of 2002, Pub. L. 107-77 further amended the FSIA by adding a specific reference to the *Roeder* case in the list of exceptions to sovereign immunity. 28 U.S.C. § 1605(a)(7)(A). When President Bush signed the bill into law on November 28, 2001, he stated:

Section 626 . . . subsection (c) purports to remove Iran's immunity from suit in a case brought by the 1979 Tehran hostages in the District Court for the District of Columbia. To the maximum extent permitted by applicable law, the Executive Branch will act, and encourage the courts to act, with regard to subsection 626(c) of the bill in a manner consistent with the obligations of the United States under the Algiers Accords that achieved the release of the U.S. hostages in 1981.

37 WEEKLY COMP. PRES. DOC. 1723, 1724 (Dec. 3, 2001).

Subsequently, in a Reply Memorandum in Support of the United States' Motion to Vacate Default Judgment and Dismiss Plaintiffs' Claims, filed November 28, 2001, the United States agreed that this amendment removed prospectively the sovereign immunity of Iran to the suit. It argued, however, that the original default judgment was still invalid and further that the case should be dismissed for lack of a cause of action. The excerpts below from the Reply Memorandum and from the Surreply Memorandum in Response to the Court's Order of November 30, 2001, filed December 7, 2001, provide the U. S. views on these points. Internal citations to other pleadings have been omitted.

The full texts of the U.S. submissions are available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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REPLY MEMORANDUM IN SUPPORT OF THE UNITED  
STATES' MOTION TO VACATE DEFAULT JUDGMENT  
AND DISMISS PLAINTIFFS' CLAIMS

\* \* \* \*

ARGUMENT

I. THE DEFAULT JUDGMENT MUST BE VACATED.

\* \* \* \*

B. The Court Cannot Ignore Its Responsibility To Determine  
Its Jurisdiction To Enter the Default Judgment.

1. *Foreign sovereign immunity is a question of subject matter jurisdiction that a federal court has an independent obligation to examine.*

A court may not refuse to vacate a judgment under Rule 60(b)(4) once it is shown that the court entering the judgment acted without jurisdiction, and plaintiffs cite no authority to the contrary. Instead, plaintiffs again challenge the government's right to seek vacatur of the default judgment, on the theory that "sovereign immunity is an affirmative defense that the foreign sovereign must invoke, not the State Department."

The idea that foreign sovereign immunity is merely a waivable defense was laid to rest in *Verlinden, B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983). There the Supreme Court held that, although passages in the legislative history of the FSIA referred to sovereign immunity as an affirmative defense, "subject matter jurisdiction under the Act turns on the existence of an exception to foreign sovereign immunity." *Id.* at 494 n. 20, citing 28 U.S.C. § 1330(a). *See also id.* at 489 (if a "claim does not fall within one of the [FSIA's] exceptions . . . , federal courts lack subject matter jurisdiction"). The D.C. Circuit has also consistently held that "if none of the exceptions to sovereign immunity applies, district courts lack jurisdiction in suits against a foreign state." *Foremost-McKesson v. Islamic Republic of Iran*, 905 F.2d 438, 442 (D.C. Cir. 1990). *See also Practical Concepts*, 811 F.2d

at 1544–45; *Persinger v. Islamic Republic of Iran*, 729 F.2d 835, 838 (D.C. Cir. 1984).

The Supreme Court has reiterated on countless occasions that “federal courts are under an independent obligation to examine their own jurisdiction,” and therefore they “are required to address the issue . . . even if the parties fail to raise [it].” *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230–31 (1990); *Floyd v. District of Columbia*, 129 F.3d 152, 155 (D.C. Cir. 1997) (same). Deciding the merits of a case without jurisdiction “carries the courts beyond the bounds of authorized judicial action” and “is, by very definition, for a court to act ultra vires.” *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94–95, 101–02 (1998). See also *NAACP v. State of New York*, 413 U.S. 345, 353 (1973) (courts must determine for themselves the scope of their jurisdiction, because jurisdiction, the power to adjudicate, is a grant of authority from Congress beyond the scope of litigants to confer). In *Verlinden*, the Court left no doubt that the federal courts’ obligation to assure themselves of their own jurisdiction applies with equal vigor to cases against foreign nations, explaining that “even if the foreign state does not enter an appearance to assert an immunity defense, a [court] still must determine that immunity is unavailable under the Act.” 461 U.S. at 494 n. 20.

\* \* \* \*

**2. *The record establishes that Iran was not designated as a state sponsor of terrorism due to the seizure and detention of the hostages.***

Once the Court discharges its “independent obligation” to examine the basis of its jurisdiction, *FW/PBS, Inc.*, 493 U.S. at 230–31, it will discover that, at least prior to the enactment of section 626(c), the exception to sovereign immunity that plaintiffs have invoked, 28 U.S.C. § 1605(a)(7), did not apply to the circumstances of this case. As enacted by the Antiterrorism Act of 1996, section 1605(a)(7) withdrew the immunity of a foreign state in a case seeking money damages for acts of terrorism, but *only* if the foreign state had been designated a state sponsor of terrorism either at the time, or because, of the terrorist acts forming the basis of the plaintiff’s claims. 28 U.S.C. § 1605(a)(7)(A); *Elahi v.*



*Islamic Republic of Iran*, 124 F. Supp. 2d 97, 107 (D.D.C. 2000).

The government has already shown that Iran was first designated as a terrorist state in January 1984, long after the hostages' release, and for reasons unrelated to their seizure and detention from 1979 to 1981. As explained contemporaneously in the March 1984 edition of the State Department Bulletin, the "official record of U.S. foreign policy," Gov't Exh. 8, at 3, the designation of Iran as a state sponsor of terrorism was "based on convincing evidence o[f] a broad Iranian policy furthering terrorism *beyond its borders*," *id.* at 4 (January 23 entry) (emphasis added), conduct that necessarily excludes the seizure and detention of the hostages at the American Embassy in Tehran. The Cumulative Digest of United States Practice in International Law 1981–1988, prepared by the State Department's Office of the Legal Adviser, also reflects that Iran was designated a terrorist state "[a]s a result of [its] actions . . . occurring *subsequent to the Algiers Accords*." Gov't Exh. 8 at 1–2 (emphasis added).

Since the government filed its motion to dismiss, the State Department has succeeded in locating, from its microfilm archives, further official and contemporaneous documentation of the basis for Iran's designation as a state sponsor of terrorism in January 1984 (footnote omitted). By letters dated January 19, 1984, the Assistant Secretary of State for Legislative and Intergovernmental Affairs transmitted to the Speaker of the House of Representatives, the Senate Majority Leader, and other senior members of Congress, the formal determination of the Secretary of State "that Iran should be added to the list of countries which have repeatedly supported acts of international terrorism." Gov't Exh. 28. The Assistant Secretary's letter explains that "[a] careful review of the facts and statements by the Government of Iran *over the last two years* shows convincing evidence of broad Iranian policy furthering terrorism *beyond its borders*." *Id.* (emphasis added). Thus, the Assistant Secretary's letter, which makes no reference to the seizure or detention of the hostages, provides additional confirmation of the fact that the designation of Iran as a terrorist nation was not based on the seizure and detention of the hostages within Iran from 1979 to 1981. For that reason, plaintiffs' claims do not fall within the exception made to sovereign immunity under section 1605(a)(7) as originally enacted by the Antiterrorism Act in 1996.

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3. *The default judgment remains void, unless section 626(c) may be applied retroactively.*

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Owing to the amendment made by section 626(c), the Court has subject matter jurisdiction, as of November 28, 2001, to adjudicate plaintiffs' claims on the merits.<sup>5</sup> The more difficult issue is whether this new legislation retroactively confers subject matter jurisdiction to enter the August 17 default judgment. In its watershed decision in *Landgraf v. USI Film Prod., Inc.*, 511 U.S. 244 (1994), the Supreme Court stressed that "the presumption against retroactive legislation is deeply rooted in our jurisprudence," because of special concerns about the power of retroactive statutes to "sweep away settled expectations," and their use as "means of retribution against unpopular groups or individuals." *Id.* at 265–66. In light of this presumption, "[a] statute may not be applied retroactively . . . absent a clear indication from Congress that it intended such a result." *INS v. St. Cyr*, 121 S. Ct. 2271, 2288 (2001). . . . Here, as in *Hughes Aircraft [v. United States]*, 520 U.S. 939, 951 (1997)], section 626(c) "creates jurisdiction where none previously existed," thus arguably affecting "substantive rights" by eliminating a pre-existing legal defense to a cause of action. 520 U.S. at 951–52. If that is so, then the "traditional presumption against retroactivity teaches that it does not govern absent a clear congressional intent favoring such a result." *Landgraf*, 511 U.S. at 280. In that event, the default judgment still would have to be vacated for lack of subject matter jurisdiction.<sup>6</sup>

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<sup>5</sup> Section 626(c) does not specify an effective date, and is therefore effective on the date of its enactment. *LaFontant v. INS*, 135 F.3d 158, 160–61 (D.C. Cir. 1998).

<sup>6</sup> The retroactivity provision of the Antiterrorism Act of 1996, Pub. L. 104-132, § 221(c), does not resolve this issue, because by its own terms it applies only to amendments made by that Act.

**C. Plaintiffs Offer No Valid Reason Why the Default Judgment Should Not Be Vacated Under Rule 60(b)(6), Given the Extraordinary Circumstances of This Case.**

In the final analysis, the Court need not resolve the potentially difficult issues of retroactivity implicated by section 626(c). Apart from the matter of jurisdiction, the United States has shown that the default judgment should be vacated, under Rule 60(b)(6), due to the extraordinary circumstances of this litigation. First, prior to the government's intervention, matters that are "central to the litigation" were not disclosed to the Court, to wit, the United States' commitment under the Algiers Accords to bar and preclude the prosecution of cases such as this one, and the federal regulations giving effect to that commitment by prohibiting plaintiffs from pressing their claims against Iran. [See] *Computer Professionals*, 72 F.3d at 903. Plaintiffs do not dispute that the Algiers Accords were not previously brought to the Court's attention, and attempt no argument that these prohibitions on the very maintenance of this action could be viewed as anything but "central to the litigation." Thus, the default judgment should be vacated on this ground alone.

Second, the foreign policy ramifications of allowing these proceedings to culminate in a money judgment against Iran, in derogation of a binding international legal agreement to which the United States is a party, and due regard for the judgment of the Executive Branch in foreign affairs, also require that the default judgment be set aside. [See] *Practical Concepts*, 811 F.2d at 1548, 1551–52 & n. 19. In the face of this argument, plaintiffs again find themselves at a virtual loss for words. Their sole argument for denying relief on this ground is that vacating the default judgment will not advance the specific foreign policy objective identified by the government in *Practical Concepts*, that of encouraging foreign nations to appear in our courts in cases brought under the FSIA. *Id.* at 1552.

Whether or not that is so, plaintiffs' argument still fails, because *Practical Concepts* nowhere seizes on that single interest as the sole foreign policy justification for vacating a default judgment. Rather, the Court of Appeals observed generally that "[i]ntolerant adherence to default judgments against foreign states

could adversely affect this nation's relations with other nations," *in addition to* "undermin[ing] the State Department's continuing efforts to encourage . . . foreign sovereigns generally to resolve disputes within the United States' legal framework." 811 F.2d at 1551 n. 19. Refusing to consider other foreign policy interests that the government identifies as grounds for vacating a default judgment would not be in keeping with the deference owed to the Executive Branch in the realm of foreign affairs. *See Regan v. Wald*, 468 U.S. 222, 242–43 (1984); *United States v. Pink*, 315 U.S. 203, 230 (1942); *Belk v. United States*, 858 F.2d 706, 710 (Fed. Cir. 1988). Accordingly, the default judgment should be vacated under Rule 60(b)(6), as well as Rule 60(b)(4).

## II. THIS CASE SHOULD BE DISMISSED, BECAUSE PLAINTIFFS CANNOT PREVAIL ON THE CLAIMS THEY SEEK TO LITIGATE IN THIS COURT.

### A. The Flatow Amendment Gives Plaintiffs No Cause of Action Against Iran That They May Press in Derogation of the Algiers Accords.

The United States reiterates that, in light of H.R. 2500, § 626(c), the government no longer relies on foreign sovereign immunity as a basis for dismissing plaintiffs' claims. At the very least, as of section 626(c)'s enactment on November 28, this Court has been vested with subject matter jurisdiction to adjudicate plaintiffs' claims. That said, plaintiffs' claims still must be dismissed, for they are barred by the legal prohibitions enacted pursuant to the Algiers Accords.

In keeping with the United States' obligations under the Algiers Accords, federal law (Executive Order No. 12283, and its implementing regulations, 31 C.F.R. § 535.216(a)), prohibits plaintiffs "from prosecuting . . . any claim against the Government of Iran arising out of events . . . relating to: (1) [t]he seizure of the hostages on November 4, 1979; [or] (2) [their] subsequent detention. . . ." Plaintiffs nonetheless maintain that the so-called Flatow Amendment supplies a cause of action that they may pursue, notwithstanding these prohibitions. However, as the United States observed previously, the plain language of the Flatow Amendment provides the victims of terrorist acts a cause of action against the

“official[s], employee[s] or agent[s] of a foreign state” who commit such acts, not against the foreign state itself. Statutory analysis begins in all cases with the language of the statute, and if the meaning is clear, then the analysis ends there as well, and the court’s sole function is to enforce the statute according to its terms. *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *Harbor Gateway Comm’l Property v. EPA*, 167 F.3d 602, 606 (D.C. Cir. 1999).

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### **B. There Is No Conflict Between the Algiers Accords and the Antiterrorism Act of 1996.**

It comes as no surprise, therefore, that instead of championing the Flatow Amendment against the Algiers Accords, plaintiffs attempt to portray the case as a contest between the Algiers Accords and the Antiterrorism Act of 1996. According to plaintiffs, it is the government’s contention that the Algiers Accords “trump” the Antiterrorism Act, and they devote much effort to the argument that “the conflict between the Algiers Accords and the Antiterrorism Act . . . must be resolved in favor of Congress.” This argument is deeply confused, because it completely fails to appreciate the fundamental distinction between jurisdiction to hear a claim, and the substantive law to be applied in adjudicating the claim.

There is no conflict between the Antiterrorism Act and the Algiers Accords, and the government has not contended otherwise. As relevant here, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 221, 110 Stat. 1214, 1241 (entitled “Jurisdiction for Lawsuits Against Terrorist States”) created a new exception to foreign sovereign immunity under the FSIA, codified at 28 U.S.C. § 1605(a)(7). In so doing, it extended the jurisdiction of the federal courts to permit them to hear claims against designated terrorist states for the acts of terrorism that they sponsor. *See Elahi*, 124 F. Supp. at 106; *Flatow*, 999 F. Supp. at 12–13. But, as plaintiffs have acknowledged, the Antiterrorism Act did not itself create a cause of action for the victims of terrorist states’ offenses, *id.*, and plaintiffs here have looked elsewhere (to the Flatow Amendment) to find one.

In complete contrast, both the Supreme Court and the D.C. Circuit have held that the provisions of the Algiers Accords and

their implementing regulations that extinguish the claims of American nationals against Iran constitute “substantive law governing” the cases, such as this one, that fall within their reach. *Dames & Moore*, 453 U.S. at 685; *American International Group*, 657 F.2d at 441. In so holding, both courts explicitly rejected arguments that the Algiers Accords represent an improper effort by the Executive Branch to define the jurisdiction of the federal courts. *Dames & Moore*, 453 U.S. at 685–86; *American International Group*, 657 F.2d at 444. (Plaintiffs themselves refer repeatedly to the Algiers Accords as a “merits defense.”)

There can be no conflict, then, between the Algiers Accords and the Antiterrorism Act, because each is directed to a separate and independent legal issue not addressed by the other—the merits of plaintiffs’ claims, on the one hand, and jurisdiction to adjudicate the merits of plaintiffs’ claims, on the other. Whether or not this Court has jurisdiction over plaintiffs’ claims has no bearing on the legal effect of the Algiers Accords on those claims. Whether or not the Algiers Accords extinguish plaintiffs’ claims has no bearing on the jurisdiction of this Court to decide that issue. There is simply no conflict between the Antiterrorism Act and the Algiers Accords to be resolved.

It does the plaintiffs no good, then, to assert that federal statutes take precedence over international executive agreements, [see] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (9th Cir. 2001), or to invoke the doctrine of *lex posterior*, [See] *Comm. of United States Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929 (D.C. Cir. 1988). Such rules of construction would come into play only as needed to resolve a genuine conflict between a federal statute and an international legal agreement, and here there is none. *Gerling*, 240 F.3d at 751 (“assum[ing] that a conflict exists between the Holocaust Act and the Swiss-U.S. Joint Statement . . . Congress’ action controls”); *Committee of United States Citizens*, 859 F.2d at 936 (“inconsistencies” between treaties and statutes must be resolved in favor of the *lex posterior*).

Likewise, it does not advance the plaintiffs’ cause to observe that their claims involve the “type of conduct” that Congress had in mind when it passed the Antiterrorism Act. That only goes to show that Congress meant the federal courts to have jurisdiction over causes of action involving this type of conduct (assuming the

other conditions under section 1605(a)(7) have been met), not that Congress *created* such a cause of action when it passed the Antiterrorism Act. It is also of no moment that Congress expressly intended this exception to foreign sovereign immunity to apply retroactively to past acts of terrorism. Regardless of the statute's temporal reach, it does not touch upon the merits of plaintiffs' claims, and therefore creates no conflict with the mandate of the Algiers Accords.

In the same vein, plaintiffs also attempt to portray the case as a contest between the Algiers Accords and the FSIA, as originally enacted in 1976. Without citation, plaintiffs assert that Congress intended the FSIA to function as a "statutory barrier to further encroachments by the State Department upon the doctrine of sovereign immunity," by superseding "executive agreements with foreign sovereigns to expand the defense of sovereign immunity."

This argument, apparently inspired by plaintiffs' flawed historical account of the FSIA as a measure enacted to "oust" the State Department from the process of making sovereign immunity determinations, has been heard before and was squarely rejected by both the Supreme Court in *Dames & Moore*, and the D.C. Circuit in *American International Group*. In both cases, the complaining parties argued that the Algiers Accords represented an improper attempt by the Executive Branch to circumscribe the jurisdiction of the federal courts to hear their claims, and in both cases the courts disagreed. They concluded instead that the Algiers Accords "simply effected a change in the law governing" those claims. *Dames & Moore*, 453 U.S. at 685; *American International Group*, 657 F.2d at 441–42.

Moreover, both *Dames & Moore* and *American International Group* explicitly rejected the proffered interpretation of the FSIA as prohibiting the President from settling claims of United States nationals against foreign government, noting that the same Congress that enacted the FSIA had also "rejected several proposals designed to limit the power of the President to enter into executive agreements, including claims settlement agreements." *Dames & Moore*, 453 U.S. at 685–86; *American International Group*, 657 F.2d at 444. See also *Chas T. Main International*, 651 F.2d at 813–14 & n. 23. The Algiers Accords are no more in conflict with the jurisdictional provisions of the FSIA than they are in

conflict with the jurisdictional provisions of the Antiterrorism Act.

Plaintiffs are right that Iran should accept responsibility for the morally repugnant acts of hostage-taking and torture committed against them. But redress cannot be had in this forum, owing to the legal commitments made by this nation in order to free the hostages from captivity. The Supreme Court's eloquent observations in *Chew Heong v. United States*, 112 U.S. 536, 539–40 (1884), remain valid today:

There would no longer be any security . . . no longer any commerce between mankind, if [nations] did not think themselves obliged to keep faith with each other, and to perform their promises \* \* \* Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact that the honor of the government and people of the United States is involved in every inquiry whether rights secured by such stipulations shall be recognized and protected [internal quotations and citations omitted].

In consequence of the duties imposed upon this Court by the Constitution, and respect for the legal undertakings of our government with foreign nations, the default judgment must be vacated, and plaintiffs' claims must be dismissed for failure to state a claim that survives the United States' commitments made under the Algiers Accords.

**UNITED STATES SURREPLY MEMORANDUM IN  
RESPONSE TO THE COURT'S ORDER OF  
NOVEMBER 30, 2001**

\* \* \* \*

**IV. WHETHER THE FLATOW AMENDMENT OR § 626(C)  
CAN ABROGATE THE ALGIERS ACCORDS AND  
THEIR IMPLEMENTING REGULATIONS**

In *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243 (1984), the Supreme Court held that Congress's repeal of the Par Value Modification Act (the "PMVA"), which set an official price



of gold in the United States, did not render the air cargo liability limits of the Warsaw Convention unenforceable in the United States, even though these limits were expressed in terms of a gold standard. The Court reached this conclusion in principal reliance on the “firm and obviously sound canon of construction against finding implicit repeal of a treaty in ambiguous congressional action.” *Id.* at 252. “A treaty will not be deemed to have been abrogated or modified by a later statute unless such purpose on the part of Congress has been clearly expressed,” the Court wrote. “Legislative silence is not enough. . . .” *Id.* (internal citations and quotations omitted). Finding no reference to the Warsaw convention in the language or legislative history of the Act repealing the PMVA, *id.*, the Court held that the Act “cannot be construed as terminating or repudiating the United States’ duty to abide by the Convention’s cargo liability limit.” *Id.* at 253.

*Weinberger v. Rossi*, 456 U.S. 25 (1982), relied on the same canon of construction in a case involving an international executive agreement. *Rossi* involved an amendment to the Military Selective Service Act (“MSSA”), which prohibited employment discrimination against U.S. citizens on military bases overseas, unless permitted by “treaty.” Presented for decision was whether this amendment repudiated an earlier executive agreement that guaranteed preferential employment of Filipino citizens on U.S. military bases in the Philippines. *Id.* at 26–27. The Court took as its starting point the maxim that “an act of [C]ongress ought never to be construed to violate the law of nations, if any other possible construction remains.” Proceeding from there, the Court held that, “absent some affirmative expression of congressional intent to abrogate the United States’ international obligations” in the language or legislative history, the “treaty exception” in the MSSA should be construed to include international executive agreements, as well as Article II treaties, to avoid a construction of the Act that would invalidate the agreement with the Philippines. *Id.* at 32–36. In so holding, the Court observed that *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 20–21 (1963), had also applied this canon to avoid construing an Act of Congress in a manner contrary to federal regulations, where doing so would have had foreign policy implications. *Id.* at 32.

Under *TWA*, *Weinberger*, and *McCulloch*, neither the Flatow Amendment, nor § 626(c), can be construed as abrogating the United States' commitment under the Algiers Accords to bar and preclude the prosecution of claims such as plaintiffs have asserted here, or the implementing federal regulations, which in fact prohibit plaintiffs from litigating their claims against Iran. Even if this Court assumed for purposes of analysis that the Flatow Amendment provides a cause of action against foreign states at all, there is no reference in the language or legislative history of the Flatow Amendment to the Algiers Accords, and certainly no clear expression on the part of Congress to abrogate or modify the terms of the United States' commitments thereunder. *See TWA*, 466 U.S. at 252. Absent such "affirmative expression of congressional intent," *Rossi*, 456 U.S. at 32; *McCulloch*, 372 U.S. at 20–21, the Court must instead construe the Flatow Amendment in a manner that is consistent with the Algiers Accords, if any such construction is possible.<sup>5</sup>

Of course, the only straightforward construction of the Flatow Amendment is that it supplies no cause of action against foreign states whatsoever. Again, however, even if the Court assumed as a general matter that the Flatow Amendment created a cause of action against foreign states, it may still be harmonized with the Algiers Accords. It need only be viewed, quite naturally, as supplying a new legal cause of action for those who still possess viable claims against terrorist nations, rather than reviving the claims of others, such as the plaintiffs here, whose particular claims have already been legally compromised or extinguished.

For similar reasons, § 626(c) also cannot be construed as abrogating the Algiers Accords, or their implementing federal regulations. In the first place, § 626(c), like the Antiterrorism Act, is a jurisdictional statute which, by its very nature, cannot come into conflict with, or, therefore, abrogate the Algiers Accords, which provide the "substantive law governing" the decision of this case. [*See Dames & Moore v. Regan*, 453 U.S. 654, 685 (1981)]. Moreover, there is no clear expression, either in the statutory text,

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<sup>5</sup> This is all the more so considering that the United States undertook in the Algiers Accords to bar and preclude the prosecution against Iran of any pending "or future" claims arising out of the seizure and detention of the hostages. General Declaration, ¶ 11, 20 I.L.M. 223, 227 (Gov't Exh. 1).

or in the Conference Report's opaque description of § 626(c), of a congressional purpose to renounce the commitments our Nation made under the Algiers Accords. Therefore, § 626(c) "cannot be construed as terminating or repudiating the United States' duty to abide by" the Algiers Accords. *TWA*, 466 U.S. at 253. Instead, § 626(c) should be taken at its word, but no further, as merely granting the Court the jurisdiction it lacked before to decide whether plaintiffs have stated claims that survive the implementation of the Algiers Accords.

Plaintiffs nonetheless perceive a conflict between the Algiers Accords, and the legislative act of granting the Court jurisdiction to decide their claims, that is "alone enough to abrogate the provisions of the Algiers Accords being invoked by the State Department." But, as the government observed earlier, merely granting the Court jurisdiction to hear whatever claims the plaintiffs may have is not the equivalent of granting them a cause of action for damages against Iran in outright renunciation of the Algiers Accords. . . .

\* \* \* \*

*See also Dalberti v. Republic of Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001) (acts of Iraq stemming from hostage taking and torture; on motion for default judgment, plaintiffs entitled to \$10,000 for each day of captivity, spouses entitled to 1.5 million for solatium); *Hill v. Republic of Iraq*, 175 F. Supp. 2d 36 (D.D.C. 2001) (American citizens detained as "human shields" by Iraq awarded damages for hostage-taking, false imprisonment, and associated pain, suffering and mental anguish, as well as punitive damages);

## 5. Effect of Extradition Request under FSIA

On December 3, 2001, the Ninth Circuit Court of Appeals heard arguments in *Blaxland v. Commonwealth Director of Public Prosecutions*, Civ. No. 00-56330, on appeal from a district court decision declining to dismiss an action against Australian law enforcement agencies alleging malicious prosecution in the course of extradition proceedings. Plaintiff in the case had been extradited to Australia, where he was tried

on securities fraud charges and acquitted. On his return to California, he filed suit in the Los Angeles superior court against Australian governmental entities and officials of the entities, alleging that they provided false information to the United States Attorney, submitted false or misleading statements in affidavits submitted to the district court in order to secure his arrest and extradition, and wrongfully opposed his bail applications in an effort to coerce him into accepting a plea agreement. The case was removed to federal district court and defendants filed a motion to dismiss on grounds of sovereign immunity. Without explaining the basis for its ruling, the district court granted the motion as to individual named defendants but denied the motion as to the Australian governmental entities. The governmental entities appealed the district court's denial of their motion to dismiss and the United States filed a brief as *amicus curiae* on December 22, 2000 in support of defendants' appeal.

The excerpts from the brief set forth below address the exceptions to the FSIA on which plaintiffs attempted to rely for non-commercial tort and waiver in the context of the extradition request. The background of the Foreign Sovereign Immunities Act is provided in excerpts from *Hwang Geum Joo v. Japan*, *supra* 10.A.2.

The full text of the brief is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## INTEREST OF THE UNITED STATES

\* \* \* \*

The district court decision . . . is inconsistent with Congress's grant to foreign governments, in the Foreign Sovereign Immunities Act, of immunity for their public acts. If upheld, the district court's opinion will disrupt the normal function of our extradition treaties with foreign states and, if followed abroad, subject the United States to suit in foreign courts for the exercise of its sovereign prosecutorial function.

\* \* \* \*

## ARGUMENT

\* \* \* \*

**B. Plaintiffs' Claims Cannot Be Brought Under Paragraph (a)(5) Because Congress Has Preserved Foreign States' Immunity For Claims Arising Out Of Quintessentially Public Acts Such As Extradition And Prosecution.**

Paragraph (a)(5) of Section 1605 establishes an exception to the general rule of foreign governmental immunity for claims based upon non-commercial tortious conduct causing "personal injury or death, or damage to or loss of property, occurring in the United States." 28 U.S.C. § 1605(a)(5). This exception does not extend to all torts that "have had effects in the United States." *Amerada Hess*, 488 U.S. at 441. Rather, it "covers only torts occurring within the territorial jurisdiction of the United States." *Ibid*.

Both the statutory language and legislative history make clear that Congress did not intend to abrogate foreign states' immunity for such quintessentially sovereign acts as the exercise of prosecutorial discretion or the invocation of extradition treaties. See H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), *reprinted in* 5 U.S.C.C.A.N. 1976, 6604, 6605 ("restrictive" theory of sovereign immunity maintains immunity for "suits involving a foreign state's public acts (*jure imperii*)"). Although "cast in general terms as applying to all [non-commercial] tort actions for money damages," the exception provided for in paragraph (a)(5) was "directed primarily at the problem of traffic accidents." *Id.* at 20-21, *reprinted in* 5 U.S.C.C.A.N. 1976, 6604, 6619. Congress specifically limited the scope of paragraph (a)(5) by imposing two exceptions which preserve foreign state immunity with respect to "(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function" and "(B) any claim arising out of malicious prosecution, abuse of process . . . [or] misrepresentation." 28 U.S.C. § 1605(a)(5)(A) & (B). As Congress noted, these exceptions "correspond to many of the claims with respect to which the U.S. Government retains immunity under the Federal Tort Claims Act ["FTCA"], 28 U.S.C. 2680(a) and (h)." H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), *reprinted in* 5 U.S.C.C.A.N. 1976, 6604, 6605.

To the extent that plaintiffs' claims are based on conduct that occurred in the United States, and thus meet the threshold require-

ment of paragraph (a)(5), they are barred by the exceptions to that rule. Under the express language of (a)(5)(B), paragraph (a)(5) does not confer jurisdiction over Blaxland's first and second causes of action, which the Complaint characterizes as claims for "malicious prosecution" and "abuse of process." 28 U.S.C. § 1605(a)(5)(B). Likewise, the Blaxlands cannot bring their claims for intentional infliction of emotional distress, false imprisonment, or loss of consortium under the non-commercial tort exception because these claims "aris[e] out of" Blaxland's claims for malicious prosecution and abuse of process. 28 U.S.C. § 1605(a)(5)(B).

Under the reasoning of *Thomas-Lazear v. FBI*, 851 F.2d 1202, 1206–07 (9th Cir. 1988)], plaintiffs' claims for intentional infliction, false imprisonment, and loss of consortium "arise out of" Blaxland's barred claims for malicious prosecution and abuse of process. Plaintiffs' causes of action for intentional infliction, false imprisonment and loss of consortium simply "incorporate[] the allegations of all the other claims" by reference. *Thomas-Lazear*, 851 F.2d at 1206. The accusations that Shaw and Barry supplied false and misleading information to the United States Attorney and district court—the central allegations of the malicious prosecution and abuse of process counts—"are essential to" plaintiffs' claims for false imprisonment, intentional infliction of emotional distress and loss of consortium. *Thomas-Lazear*, 851 F.2d at 1206. As in *Thomas-Lazear*, plaintiffs' intentional infliction, false imprisonment and loss of consortium causes of action are "nothing more than an effort to remove the damage element from [the malicious prosecution and abuse of process claims] and plead it separately" as a series of independent torts. *Ibid.* Indeed, the Complaint explicitly identifies Blaxland's imprisonment and separation from his wife and the attending emotional distress as the injury for which Blaxland seeks compensation in his malicious prosecution and abuse of process claims.

The conclusion that plaintiffs' claims fall outside the non-commercial tort exception is further supported by § 1650(a)(5)(A), which clarifies that paragraph (a)(5) does not extend to "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function." This provision reflects Congress's intent to abrogate foreign states' immunity only for "private acts" while preserving that immunity for "pub-

lic acts.” H.R. 1487, 94th Cong., 2d Sess., 7 (Sept. 9, 1976), *reprinted in* 5 U.S.C.C.A.N. 1976, 6604, 6605. The discretionary determination to pursue a prosecution or to invoke a treaty of extradition are core public acts for which Congress intended to preserve foreign governments’ immunity. As the Supreme Court recognized in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the “[e]xercise of the powers of police and penal powers,” including the “expulsion of an alien,” are acts exclusively undertaken by states. *Id.* at 362. Even when abused, “a foreign state’s exercise of the power of its police has long been understood for purposes of the restrictive theory [of foreign sovereign immunity] as peculiarly sovereign in nature.” *Id.* at 361. *See also* *Herbage v. Meese*, 747 F. Supp. 60, 62, 66–67 (D.D.C. 1990) (holding barred under the FSIA claims against British officials for carrying out extradition request based upon alleged perjury), *aff’d*, 946 F.2d 1564 (D.C. Cir. 1991). *Cf. General Dynamics Corp. v. United States*, 139 F.3d 1280, 1286 (9th Cir. 1998) (decision to prosecute protected by discretionary function exception to the FTCA).

**C. Australia’s Invocation Of Its Rights Under The Treaty Of Extradition With The United States Did Not Constitute A Waiver Of Australia’s Immunity From Suit In U.S. Courts.**

Plaintiffs’ contention that the district court had jurisdiction under the waiver provision of 28 U.S.C. § 1605(a)(1) also fails as a matter of law. Such an extension of paragraph (a)(1) would run directly contrary to Congress’s specific determination in paragraph (a)(5) not to abrogate foreign states’ immunity for claims of malicious prosecution and abuse of process.

The courts of appeals, including this Court, have consistently held that the waiver provision of paragraph (a)(1) should be “narrowly construed.” *Joseph v. Office of the Consulate General of Nigeria*, 830 F.2d 1018, 1022 (9th Cir. 1987); *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239, 243 (2d Cir. 1996); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 444 (D.C. Cir. 1990); *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th Cir. 1985). In support of this conclusion, the courts have cited the narrow list of examples given by Congress in the legislative history of the implied

waiver provision. Congress specifically referred to three circumstances that would constitute implied waivers—"where a foreign state has agreed to arbitration in another country," "where a foreign state has agreed that the law of a particular country should govern a contract," and "where a foreign state has filed a responsive pleading without raising the defense of sovereign immunity." H.R. Rep. No. 94-1487, 94th Cong., 2d Sess. at 18, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617. Although these examples are not exclusive, "courts have resisted expanding the scope of the implied waiver beyond these three examples." *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996) ("*Servicios Maritimos*") (citing *Frolova*, 761 F.2d at 377); *Joseph*, 830 F.2d at 1022 ("[i]mplicit waivers are ordinarily found only" in the three circumstances cited by Congress).

The implied waiver provision cannot be construed in such a way as to conflict with Congress's determination in paragraph (a)(5) not to abrogate foreign governments' immunity for claims arising out of malicious prosecution and abuse of process. In paragraph (a)(5)(B), Congress explicitly preserved foreign sovereigns' immunity against allegations of malicious prosecution and abuse of process committed before courts in the United States.<sup>5</sup> Although (a)(5)(B) does not, by its own terms, prevent foreign states from consenting, under paragraph (a)(1), to U.S. jurisdiction over malicious prosecution claims, the express provisions of (a)(5)(B) do preclude a rule by which every claim for malicious prosecution or abuse of process that would be barred by (a)(5)(B) is converted *ipso facto* into a deemed waiver of immunity. In light of the express statement in paragraph (a)(5)(B) that foreign states will *not* be subject to malicious prosecution or abuse of process claims for their conduct before U.S. courts, the Court simply cannot find that Australia knowingly waived its immunity to such claims when it invoked its rights under treaty to have Blaxland extradited.

Even apart from this conflict with paragraph (a)(5)(B), plaintiffs' implied waiver argument fails because plaintiffs' evidence does not support a conclusion that Australia waived its immu-

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<sup>5</sup> As noted above, paragraph (a)(5) applies only to torts committed within the United States. See *Amerada Hess*, 488 U.S. at 441. Thus, paragraph (a)(5)(B)'s reference to claims of malicious prosecution or abuse of process necessarily relates to alleged misconduct committed *before courts in the United States*.



nity knowingly and intentionally. The examples of implicit waiver listed by Congress in the statutory history reflect that an implied waiver of immunity should not be found “without *strong evidence* that this is what the foreign state *intended*.” *Servicios Maritimos*, 89 F.3d at 655 (quoting, with emphasis, *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993)). Other courts of appeals have similarly insisted upon a showing that the foreign sovereign intended to waive its immunity. *Frolova*, 761 F.2d at 378 (“waiver would not be found absent a *conscious decision* to take part in the litigation and a failure to raise sovereign immunity despite the opportunity to do so” (emphasis added)); *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1174 (D.C. Cir. 1994) (“the amici’s *jus cogens* theory of implied waiver is incompatible with the intentionality requirement implicit in § 1605 (a)(1)”; *Drexel Burnham Lambert Group, Inc. v. Committee of Receivers for Galadari*, 12 F.3d 317, 326 (2d Cir. 1993) (waiver must be “unmistakable” and “unambiguous”).

Applying this standard, this Court has refused to find intentional waivers in numerous cases under the FSIA. In *Joseph*, the Nigerian Consulate had entered a lease agreement that specifically contemplated court litigation arising out of the agreement. 830 F.2d at 1022.<sup>6</sup> In light of this provision and the purely local nature of the contract the Court concluded that “it is virtually inconceivable that the Consulate contemplated that adjudication of disputes would occur in a court outside of the United States.” *Id.* at 1022–23. Yet, despite this evidence, the Court was unwilling to rely solely upon the waiver exception, and, instead, relied upon the commercial activity exception to the FSIA. *See id.* at 1023 & n.6, 1024. In *Servicios Maritimos*, the state petroleum refinery of Mexico (“Pemex”) intervened in litigation in the U.S. District Court to assert claims against the defendant petroleum tanker for conversion and several additional causes of action relating to defendant’s contamination of and failure to deliver its cargo. 89 F.3d at 653. The defendant countersued, alleging breach of contract, fraud, and other claims relating to the same cargo. *Ibid.* Despite the fact that Pemex affirmatively had invoked the district

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<sup>6</sup> The lease provided that “[i]n the event that any action shall be commenced . . . concerning this lease . . . then in addition to all other *relief at law or equity*, the prevailing party shall be entitled to recover attorney’s fees as *fixed by the court*.” *Joseph*, 830 F.2d at 1022 (emphasis added).

court's jurisdiction to assert its own claims, this Court refused to find that Pemex had waived its immunity with respect to the counterclaims under the demanding standard required by 28 U.S.C. § 1605(a)(1). *Id.* at 655–56 (“aside from the fact that Pemex did not assert its immunity in its complaint, there is no evidence to show that the immunity was intentionally waived”).<sup>7</sup> *See also Hilao v. Estate of Marcos*, 94 F.3d 539, 547 (9th Cir. 1996) (refusing to find waiver of immunity by the Republic of Philippines from either its filing of an amicus brief in the litigation at issue or its filing of claims in U.S. court against the same assets sought by plaintiff).

There is even less evidence in this case of an intentional waiver than in *Joseph, Servicios Maritimos*, or *Hilao*. In all three of those cases the foreign state had evidenced a clear recognition that a U.S. court could or would exercise jurisdiction to adjudicate legal claims for money damages involving the foreign state. *See Hilao*, 94 F.3d at 547; *Servicios Maritimos*, 89 F.3d at 653; *Joseph*, 830 F.2d at 1022. Here, in contrast, Australia merely invoked its rights under a treaty of extradition to have Blaxland returned to Australia to stand trial *before an Australian court*. As this Court has explained, a U.S. court asked to grant extradition is *not* called upon to determine the merits of the criminal charge. *See Mainero v. Gregg*, 164 F.3d 1199, 1205 (9th Cir. 1999) (magistrate merely required to determine “probable cause” to sustain charge).

Plaintiffs base their argument entirely upon this Court's decision in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992). Plaintiffs' reliance on *Siderman* is misplaced: that decision is distinguishable as a matter of both fact and law. In *Siderman*, plaintiff alleged that he had been tortured in Argentina. After Siderman fled that country, the Argentine government filed baseless criminal proceedings against him, and sent a letter roga-

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<sup>7</sup> The Court concluded that the exercise of jurisdiction over certain claims was proper under a separate provision of the FSIA, 28 U.S.C. § 1607, in which Congress abrogated foreign states' immunity “with respect to any counterclaim . . . arising out of the same transaction or occurrence that is the subject matter of the claim of the foreign state.” *See Servicios Maritimos*, 89 F.3d at 656. The counterclaim provision of the FSIA is not implicated in this case, and was not relied upon by plaintiffs, because plaintiffs' claims are not asserted as counterclaims to an “action brought by a foreign state.” 28 U.S.C. § 1607.

tory to the Los Angeles Superior Court seeking its assistance in serving papers on Siderman, as part of Argentina's effort to have Siderman returned for further persecution. *Id.* at 703, 722. Siderman later sued Argentina for torture and expropriation of property. *Id.* at 704. This Court concluded that Siderman had presented sufficient evidence to support a finding that Argentina had implicitly waived its immunity by invoking the jurisdiction of the California court in its effort to persecute and torture Siderman. *Id.* at 722. The Court stated that a foreign state impliedly waives its immunity when there "exist[s] a direct connection between the sovereign's activities in our courts and the plaintiff's claims for relief." *Ibid.* The Court emphasized, however, that it was not holding that "any foreign sovereign which takes actions against a private party in our courts necessarily opens the way to all manner of suit by that party." *Ibid.*

In clear distinction to this case, *Siderman* did not concern claims with respect to which Congress had specifically preserved a foreign state's immunity. In *Siderman*, the plaintiffs asserted claims arising out of torture and expropriation of property in Argentina. *Id.* at 704; *Siderman de Blake v. Republic of Argentina*, 1984 WL 9080 (C.D. Cal. Sept. 28, 1984). Thus, the Court did not address claims arising from tortious conduct that occurred in the United States or claims arising out of malicious prosecution or abuse of process. *See Siderman*, 965 F.2d at 714, 720 n.17. Indeed, the Court specifically noted that *Siderman* had not asserted jurisdiction based upon paragraph (a)(5). *See ibid.* Plaintiffs' proposed extension of *Siderman* to claims arising out of malicious prosecution and abuse of process—the filing of false statements—before a U.S. court is precluded by the plain language of paragraph (a)(5)(B), as explained above.

Further, extension of *Siderman* to this case would be inappropriate because it would, in effect, penalize Australia for doing no more than exercising its rights under a treaty with the United States. Under the Treaty of Extradition Between The United States of America and Australia of May 14, 1974, as amended by a Protocol signed September 4, 1990 (Extradition Treaty) (Addendum), Australia was required to, and did, make its extradition request to the State Department. 1990 Protocol, Art. 7 ("All requests for extradition shall be made through the diplomatic channel."). The United States Attorney then filed the extradition

request on Australia's behalf. In *Siderman*, by contrast, Argentina made its request for assistance directly to the Los Angeles Superior Court and does not appear to have acted under any treaty with the United States. 965 F.2d at 703 (fn. omitted). Moreover, Australia was *required* under the Treaty to submit with the request "a description of the facts, by way of affidavit, statement, or declaration, setting forth reasonable grounds for believing that an offense has been committed and that the person sought committed it." 1990 Protocol, Art. 7(3)(c). If *Siderman* were extended to this case, then Australia, and presumably any other foreign state with whom the United States has a similar treaty of extradition, would be deemed to have waived its immunity from suit every time that it submits an extradition request and accompanying affidavits.

Such a ruling would significantly broaden the role of the U.S. courts with respect to foreign states' extradition requests. As this Court has frequently observed, in reviewing an extradition request, the judge's role is limited to determining whether (1) the crime is extraditable and (2) there is probable cause to sustain the charge. *See, e.g., Mainero v. Gregg*, 164 F.3d 1199, 1205 (9th Cir. 1999); *Emami v. U.S. District Court*, 834 F.2d 1444, 1447 (9th Cir. 1987); *Quinn v. Robinson*, 783 F.2d 776, 787 (9th Cir. 1986). On habeas review, the reviewing court's function is similarly limited. *Mainero*, 164 F.2d at 1205. Plaintiffs' suit seeks to circumvent these limitations by bringing what is in essence a collateral attack on Blaxland's extradition and trial. To entertain plaintiffs' suit would constitute a fundamental expansion of the role of the courts in the extraditing jurisdiction that would seriously impair the functioning of our extradition treaties and could result in foreign courts exercising jurisdiction over the United States whenever an extradited individual asserts that the basis for extradition was fabricated.

Because, as the Supreme Court has held, the FSIA is the exclusive basis for jurisdiction over a foreign sovereign, the ultimate question in this case is whether Congress intended that a foreign state's invocation of its rights under an extradition treaty would subject that state to claims in United States courts arising out of malicious prosecution and abuse of process. In light of Congress's express preservation of foreign states' immunity from such claims

in § 1605(a)(5)(B) and the foreign policy concerns such a rule would raise, the Court must conclude the Congress did not intend that Australia would be subject to suit in this case.

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## 6. Effect of Tax Treaty under FSIA

On December 12, 2001, the United States filed a Memorandum as *Amicus Curiae* in Support of Defendant's Motion to Vacate Default Judgment in *Komet, Inc. v. Republic of Finland*, Civil Action No. 99-6080 (JWB) in the U.S. District Court for the District of New Jersey. Plaintiffs in the case were a Finnish corporation and a United States corporation, both of which were principally owned by the same individual. Plaintiffs claimed that the Finnish taxing authorities improperly refused to allow the Finnish corporation to deduct from its income certain payments it made to the U.S. corporation. They requested the Court to direct Finland to refund the overpaid taxes. A default judgment was entered against Finland on July 2, 2001, after it failed to appear. On August 30, 2001, Finland moved to vacate the default judgment, arguing that it had not waived sovereign immunity and is immune from suit under the Foreign Sovereign Immunities Act. Excerpts below from the U.S. *amicus* brief explain that the United States interest in the case is broader than the application of a single bilateral treaty and that Article 25 of the Finland–U.S. Tax Treaty cannot be construed to waive either government's sovereign immunity from suit.

The full text of the brief is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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. . . Although this case involves a tax treaty between the United States and Finland, the court's interpretation of that treaty could have implications far wider than just this case. The United States is a party to similar tax conventions with approximately 60 other nations. All of those treaties contain provisions for dispute resolution that substantially mirror the provisions of Article 25 of the U.S.-Finland Tax Convention. To deny the Motion to Vacate could expose other nations to suit over disputes concerning their domes-

tic taxes in the courts of the United States. More significantly, it could also expose the United States to suit over U.S. taxes in the courts of other nations. . . .

## ARGUMENT

### **The Treaty Does not Waive Either Nation's Sovereign Immunity from Suit in the Courts of the Other Nation**

To have jurisdiction over the subject matter of this tax refund suit under the Foreign Sovereign Immunities Act (FSIA), the Court must find that the Republic of Finland expressly or by implication waived its sovereign immunity from suit in the courts of the United States.<sup>3</sup> If express, the Court must also find that that waiver was “clear, complete, unambiguous, and unmistakable.”<sup>4</sup> The United States agrees with the Republic of Finland, that it has not waived its immunity to be sued in United States courts for refunds of Finnish income taxes. . . .

The plaintiffs have raised only one argument in support of their position that Finland has waived its immunity. In particular, the plaintiffs quote selectively, and out of context, the provisions of Article 25 of the Tax Convention between the United States and Finland.<sup>7</sup> They argue that the following language in Article 25 explicitly waives sovereign immunity, and confers jurisdiction upon United States courts to hear disputes between Finland and taxpayers under the treaty:

1. Where a person considers that the actions of one or both of the Contracting States result or will result for him in taxation not in accordance with the provisions of this Convention, he may, irrespective of the remedies provided

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<sup>3</sup> 28 U.S.C. § 1605(a)(1).

<sup>4</sup> See, *Aguinda v. Texaco, Inc.*, 175 F.R.D. 50, 52 (S.D.N.Y. 1997) (and cases cited therein), *vacated on other grounds sub nom. Jota v. Texaco, Inc.*, 157 F.3d 153 (2d Cir. 1998).

<sup>7</sup> The full title of the treaty is “*The Convention Between the Government of the United States of America and the Government of the Republic of Finland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital*.” For simplicity’s sake, the United States refers to it as the “Treaty” or “Convention.”

by the domestic law of those States, present his case to the competent authority of the Contracting State of which he is a resident or national.

As discussed in the Republic of Finland's Reply Brief, and below, the plaintiffs misconstrue this language into something it is not. At the same time, the plaintiffs ask the Court to ignore the "competent authority" remedy which the Treaty provides in Article 25, and which is described in detail in Rev. Proc. 96-13, 1996-1 C.B. 616, a copy of which is attached for the Court's reference.

The Treaty defines "competent authority" as a term of art. Under the Treaty both Finland and the United States appoint persons to serve as their respective competent authorities, for purposes of fulfilling their obligations under the Treaty. Finland has appointed the Ministry of Finance or its authorized representative as the Finnish competent authority. The United States has appointed the Secretary of the Treasury or his delegate as the American competent authority.<sup>8</sup> Contrary to the plaintiff's argument, neither treaty partner has appointed its judicial branch or any particular court as "competent authority" in order to resolve disputes under Article 25 of the Treaty. Nor does anything in the plain language of Article 25 even remotely suggest that the treaty partners intended to subject themselves to the other nation's court system in order to resolve tax disputes between the other nation and the other nation's taxpayers. . . .

. . . In the United States, the Internal Revenue Service has described that "competent authority" process in Rev. Proc. 96-13. Section 1 of that Rev. Proc. provides that the revenue procedure "sets forth the procedures concerning requests by taxpayers for assistance of the U.S. competent authority under the provisions of an income, estate, or gift tax treaty to which the United States is a party."

. . . Section 12.05 provides that, if the competent authorities of the contracting states fail to agree, or if their agreement is not acceptable to the taxpayer, "the taxpayer may withdraw the

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<sup>8</sup> Since May 2001, the United States competent authority has been the Director, International (Large and Mid-Size Business), Internal Revenue Service. Before then, it was the Assistant Commissioner (International), Internal Revenue Service.

request for competent authority assistance and *may then pursue all rights to review otherwise available under the laws of the United States* and the treaty country.” (emphasis added). The plaintiffs can point to no law of the United States that gives it a right to judicial review of a decision of the Republic of Finland, either before or after the competent authorities have concluded their consideration of a request for relief under Article 25 of the Treaty. Certainly, the Treaty itself does not waive Finland’s sovereign immunity to permit such a lawsuit. In any event, the plaintiffs have utterly failed to use the process which both the Treaty and the IRS have provided to them. It is not up to this Court to create a process which circumvents the treaty and U.S. law.

The United States has entered into tax treaties with approximately 60 other nations, in which the treaty partners agreed to use this method for resolving disputes over double taxation. The United States is not aware of any case that has held that any similarly worded treaty provision waived sovereign immunity of a treaty partner to be sued in the courts of the other partner, or that conferred jurisdiction on the courts of the other nation.<sup>9</sup> To the contrary, at least one United States court has held that it lacked jurisdiction to compel the United States competent authority to reach any particular result, in considering a tax dispute presented by an American subsidiary of a Japanese company under the U.S.-Japan Tax Convention.<sup>10</sup>

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## **7. Collection of Judgment under FSIA**

On December 13, 2001, the United States filed a Statement of Interest in *Walters v. People’s Republic of China*, Case No. 93-5118-CV-SW-1, in the U.S. District Court for the Western

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<sup>9</sup> Indeed, U.S. courts have long held that they lack jurisdiction to enforce foreign tax judgments. *United States v. Trapilo*, 130 F.3d 547, 550 (2d Cir. 1997), *cert. denied sub nom. Pierce v. United States*, 525 U.S. 812 (1998); *Her Majesty the Queen in Right of Province of British Columbia v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979) (quoting Lord Mansfield’s proclamation in *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (1775) that, “no country ever takes notice of the revenue laws of another.”).

<sup>10</sup> *Yamaha Motor Corp, U.S.A. v. United States*, 779 F. Supp. 610 (D.D.C. 1991).



District of Missouri, Southwestern Division. Plaintiffs in the case attempted to collect on a 1996 default judgment against the People's Republic of China ("PRC") in which they were awarded \$10 million in damages in connection with the death of their son from the alleged malfunction of a Chinese-made SKS semi-automatic rifle in 1990. The assets against which they sought to execute their judgment were two giant pandas from China on loan to the National Zoological Park and related payments to the PRC or the Chinese Wildlife Conservation Association ("CWCA"). Excerpts below from the Statement of Interest reflect the views of the United States that the pandas and any funds associated with them are immune from attachment or garnishment under the sovereign immunity doctrine. No applicable provision of the Foreign Sovereign Immunities Act provides an exemption to that immunity. Internal citations to other pleadings in the case have been omitted.

The full text of the Statement of Interest is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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The identified items in Plaintiffs' Motion are the subject of a ten-year cooperative research and conservation agreement between the National Zoological Park and the CWCA, which was signed on June 17, 2000. This agreement operates under and within the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES") as well as regulations established by the governments of both the United States and the People's Republic of China. *See* Research Agreement at Introduction. The CWCA agreed to loan two pre-reproductive giant pandas, male Tian Tian and female Mei Xiang, to the National Zoological Park for ten years, during which time the CWCA maintains ownership of the pandas. *See id.* at 1.1–1.2, 2.1. One of the obligations of the National Zoological Park under the agreement is to pay the CWCA \$1 million each year, in quarterly installments, "for the purpose of supporting Chinese conservation projects of giant pandas as taken from the Chinese National Project for the Conservation of Giant Pandas and Their Habitat, the National Survey, and the Captive Breeding Plan." *Id.* at 4.1. Ninety per-

cent of all American payments must be used “to fund giant panda conservation projects”; the remaining funds must be used “for coordination, liaison, training, and conservation education, etc.” *Id.* at 4.5.

The Fish and Wildlife Service of the United States Department of the Interior issued the National Zoological Park a permit on November 17, 2000 to import the two giant pandas under CITES, the Endangered Species Act, and the Service’s giant panda policy and associated regulations. The permit itself states that the pandas “[m]ay not be used for commercial purposes.” All revenue increases at the National Zoological Park due to the presence of the pandas must be “strictly accounted for and used for the conservation of the giant panda.” Specifically, the National Zoological Park must perform an annual accounting of the funds collected as a result of the panda loan and of the transfer and use of any funds in China. Contrary to Plaintiffs’ assertions, no fee is charged to see the giant pandas. See [http:// pandas.si.edu/facts/gpfaqs.htm](http://pandas.si.edu/facts/gpfaqs.htm).

## DISCUSSION

There are four independent and compelling reasons why the giant pandas and associated funds cannot be taken to pay the default judgment. First, the Smithsonian Institution is immune from attachment or garnishment as a trust instrumentality of the United States. Second, Plaintiffs have failed to show that the CWCA is not a separate juridical entity from the People’s Republic of China, thereby barring attachment of assets belonging to the CWCA to enforce a judgment against the People’s Republic of China. Third, Plaintiffs have failed to show that the property of the CWCA has a nexus to the underlying dispute in this case. Fourth, the identified assets are non-commercial and thus are protected from attachment. Because the FSIA does not permit Plaintiffs to attach the pandas or related payments, Plaintiffs also cannot seek to garnish funds not subject to attachment under the statute.

The assets of foreign states are generally immune from attachment. Under international law, however, “states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial prop-

erty may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.” 28 U.S.C. § 1602. The FSIA creates a series of exceptions to the general immunity of foreign countries. Section 1610 provides in relevant part:

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

\* \* \* \*

(2) the property is or was used for the commercial activity upon which the claim is based

\* \* \* \*

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

\* \* \* \*

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), or (7) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

28 U.S.C. §§ 1610 (a) & (b).

By its terms, section 1610(a) permits execution of the firearms judgment against the People’s Republic of China only through attachment of property that belongs to the People’s Republic of China, has a nexus to the underlying firearms claim, and is commercial. All three requirements must be satisfied. The express text of section 1610(a) would not allow execution against the pandas

and the revenues owed to the CWCA under the research agreement between the National Zoological Park and the CWCA because Plaintiffs have not shown that these assets meet even one, much less all three, of the statutory requirements. The pandas belong to the CWCA and the funds located within the United States that are contractually bound to the CWCA belong to the United States; the assets have no alleged connection with the underlying firearms claim and judgment; and, as demonstrated below, the assets are non-commercial. *See Hercaire Int'l, Inc. v. Argentina*, 821 F.2d 559, 563 (11th Cir. 1987) (“The critical question for this court is whether the assets of a foreign state’s wholly-owned national airline are subject to execution to satisfy a judgment obtained against the foreign state, where the airline was neither a party to the litigation nor was in any way connected with the underlying transaction giving rise to the suit. For the reasons expressed below, we answer this question in the negative.”).

Because this attempt to attach the two giant pandas at the National Zoological Park, living creatures that are a symbol of Chinese-American friendship, is legally unauthorized, the Court should deny Plaintiffs’ Motion.

**A. The doctrine of sovereign immunity bars attachment or garnishment of any funds being held by the Smithsonian Institution for payment to the CWCA.**

The sovereign immunity doctrine prevents Plaintiffs from attaching or garnishing funds in the possession of the United States. *See, e.g., Department of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 264 (1999). The doctrine applies even if the United States has “set[] aside money for the payment of specific debts.” *Arizona v. Bowsher*, 935 F.2d 332, 334 (D.C. Cir. 1991); *see also Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 681 (D.C. Cir. 1936) (“It is not in the hands of the officers but in the treasury, and though earmarked as a special or trust fund, has been mingled with the moneys of the United States.”). . . . Thus, this money, which will eventually either be transferred to the CWCA for conservation and research programs involving giant pandas or be used by the National Zoological Park to support its panda research program, cannot be attached or garnished.

\* \* \* \*

**B. Plaintiffs have failed to meet their burden to show that the CWCA is not a separate juridical entity from the People's Republic of China.**

Under the FSIA, courts must presume that a foreign entity that is not an organ of the state is separate juridically from any foreign state. See *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 627 (1983) ("*Bancec*"). To overcome this presumption, plaintiffs bear the burden to show that the owner of assets, which they are trying to attach, is not entitled to separate recognition from the foreign state. See *Alejandro v. Telefonica Larga Distancia de Puerto Rico, Inc.*, 183 F.3d 1277, 1285 (11th Cir. 1999); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 447 (D.C. Cir. 1990); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 176 (5th Cir. 1989); *De Letelier v. Republic of Chile*, 748 F.2d 790, 795 (2d Cir. 1984). Moreover, it should not be easy for plaintiffs to meet this burden. See *Pravin Banker Associates, Ltd. v. Banco Popular del Peru*, 9 F. Supp. 2d 300, 305 (S.D.N.Y. 1998).

Plaintiffs do not carry their mandated burden in this case. Plaintiffs argue that because the People's Republic of China is a socialist country, no entity within the country has a separate legal status. *cf.* 28 U.S.C. § 1603(b). But showing that a foreign state owns a majority or all of an entity is not sufficient; plaintiffs must also show that the foreign country exercises extensive control over the entity. See *Bancec*, 462 U.S. at 629 (stating that an instrumentality's separate juridical status may be overcome "where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346, 352 (D.C. Cir. 1995) ("That relationship was manifested generally through Iran's control over the management of the co-defendants and through a pattern of conduct and policy statements that caused 'the agent[s] to believe that the principal desire[d] [them] so to act on the principal's account.'"); *Hester Int'l Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 181 (5th Cir. 1989) ("Although these documents demonstrate that the Federal Ministry of Agriculture may have had a general supervisory role over the NGPC, they do not

demonstrate that the Federal Government was involved in the day-to-day management of NGPC with regard to the Bansara Rice Farm project. . . . The two factors of 100% ownership and appointment of the Board of Directors cannot by themselves force a court to disregard the separateness of the juridical entities.”); *Hercaire Int’l, Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) (“The district court was in error in holding that Argentina’s 100% ownership of Aerolineas’ stock was sufficient to overcome the presumption of separate juridical existence. In the present case there is no showing that Argentina exercises such extensive control over Aerolinas as to warrant a finding of principal and agent.”); *Edlow Int’l Co. v. Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977) (“Two more precise indices of an entity’s status as state agency or instrumentality focus on the degree to which the entity discharges a governmental function, and the extent of state control over the entity’s operations. . . . The only basis, therefore, for concluding that NEK is an ‘organ’ of the Yugoslav government, or is at least 50 per cent owned by the government, is that the state ‘owns’ all forms of property in Yugoslavia. Having determined that this premise, however valid it may be in political theory, is not present to confer jurisdiction under the Foreign Sovereign Immunities Act, we lack subject matter jurisdiction under that Act.”). Cf. *In re Air Crash Disaster near Roselawn, Indiana on Oct. 31, 1994*, 96 F.3d 932, 941 (7th Cir. 1996); *Chuidian v. Philippine National Bank*, 912 F.2d 1095, 1098 (9th Cir. 1990); *Belgrade v. Sidex Int’l Furniture Trading, Inc.*, 2 F. Supp. 2d 407, 415 (S.D.N.Y. 1998).

Plaintiffs contend, in the alternative, that the People’s Republic of China not only owns the CWCA but also effectively controls it. In support, they rely on an internet web page for the CWCA. But they make a surprising and substantial error. Plaintiffs assert that the “person identified as in charge of CWCA is Mr. Wang Fuxing, the Secretary-General of China” and then argue that Mr. Wang Fuxing sits on the “highest organ of state power” in the Chinese government. It is true that the web page cited by Plaintiffs for the CWCA lists the person in charge as “Mr. WANG Fuxing, Secretary-General.” He is, however, the Secretary-General of the CWCA, not of the People’s Republic of China. The Court can take judicial notice that Mr. Jiang Zemin, with whom President George W. Bush recently met and who frequently appears in press

accounts of the People's Republic of China, is the Secretary-General of the country. Thus, the web page provides no support that the People's Republic of China in any way controls the CWCA.

Moreover, to be vulnerable as an agency or instrumentality that does not deserve separate legal recognition, an "entity generally must have some connection with the underlying dispute." *Flatow v. Islamic Republic of Iran*, 67 F. Supp. 2d 535, 542 (D. Md. 1999), *aff'd*, 225 F.3d 653 (4th Cir. 2000) (unpublished opinion). It would be fundamentally unfair to allow the assets of an entity that has no involvement with the underlying conflict to be attached. *See Hercaire Int'l Inc. v. Argentina*, 821 F.2d 559, 565 (11th Cir. 1987) ("Neither can we perceive any 'fraud or injustice' which results from insulating [the instrumentality's] property from attachment in aid of execution of the judgment against Argentina. Having had no connection whatsoever with the underlying transaction which gives rise to Argentina's liability, it would be manifestly unfair to subject [the instrumentality's] assets to such attachment."); *see also Banco Nacional de Cuba v. Chemical Bank New York Trust Co.*, 782 F.2d 377, 378 (2d Cir. 1986). Plaintiffs have made no showing of any such connection.

**C. Even if the Court disregards the presumed separate juridical status of the CWCA, Plaintiffs have failed to establish that the property of the CWCA has the required nexus to the underlying firearms claim under the FSIA.**

Assuming *arguendo* that the CWCA does not constitute a separate juridical entity from the People's Republic of China and that its assets may be attached with respect to a judgment against China, the remaining requirements of section 1610(a) of the FSIA still must be satisfied. That is, Plaintiffs may only attach property that has a nexus to the underlying claim and that is commercial. *See* 28 U.S.C. § 1610(a)(2); *Hercaire Int'l Inc. v. Argentina*, 821 F.2d 559, 563 (11th Cir. 1987). Plaintiffs make no showing that the property of the CWCA has any connection whatsoever to the underlying firearms tort claim in this case.

Section 1610(b)(2) of the FSIA, which dispenses with the nexus requirement and upon which Plaintiffs rely, does not govern this

lawsuit because the section “relates to a claim for which the *agency or instrumentality* is not immune.” 28 U.S.C. § 1610(b) (emphasis added). That is, it relates only to claims against an agency or instrumentality of a foreign state. This case does not involve a claim against the CWCA. Rather, Plaintiffs must satisfy the requirements of 28 U.S.C. § 1610(a)(2) (stating that “property . . . used for the commercial activity upon which the claim is based” is not immune). Plaintiffs do not allege that the property of the CWCA is connected, even tangentially, to the underlying default judgment.

**D. The pandas and associated funds are non-commercial in nature and are consequently immune from attachment or execution under the FSIA.**

In its research agreement respecting the two giant pandas at the National Zoological Park, the CWCA is not engaged in commercial activity. The FSIA largely leaves the term “commercial activity” undefined. *See Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992); *see also Transamerican S.S. Corp. v. Somali Democratic Republic*, 767 F.2d 998, 1002 (D.C. Cir. 1985) (“The statute’s most prominent ambiguity is the meaning of the term ‘commercial.’”). According to the FSIA, “[a] ‘commercial activity’ means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d). Courts must first define the relevant activity and then determine whether the activity qualifies as commercial. If the activity has both commercial and non-commercial components, “jurisdiction under the FSIA will turn on which element the cause of action is based on.” *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 885 (D.C. Cir. 1988).

The first step of the analysis is to define the relevant activity to be assessed. In this case, the ten-year cooperative arrangements between the CWCA and the National Zoological Park concerning the two giant pandas comprise the activity. The National Zoological Park makes an annual payment to the CWCA during



the life of the cooperative research agreement, which mandates that 90 percent of payments must “fund giant panda conservation projects” and that the remaining 10 percent be used for related administrative expenses. Research Agreement at 4.5. The Fish and Wildlife Service issued the requisite permit for the pandas’ import, which requires that the loan of the pandas be for primarily non-commercial purposes. The Service also requires the National Zoological Park to submit “an annual accounting of funds collected as a result of the panda loan” and “an annual accounting and report of the funds transferred and the use of the donated funds in China.” Import Permit and Special Conditions at ¶ 1.

Plaintiffs mistakenly construe the agreements between the National Zoological Park and various donors and corporate sponsors as the relevant activity to be analyzed. But the fact that Fujifilm or any other for-profit company may be a sponsor of the panda program at the National Zoological Park has nothing to do with whether the agreement between the CWCA and the National Zoological Park is commercial.

The second step of the analysis is to determine if the relevant activity is primarily non-commercial. *See Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987) (declining to find that “if any portion of a bank account is used for a commercial activity then the entire account loses its immunity”). To perform this task, courts almost always ask if a private person could have undertaken the activity. The Supreme Court, in *Saudi Arabia v. Nelson*, explained:

[A] state engages in commercial activity under the restrictive theory where it exercises “only those powers that can also be exercised by private citizens,” as distinct from those “powers peculiar to sovereigns.” Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts “in the manner of a private player within” the market.

507 U.S. 349, 360 (1993) (internal quotations omitted). *See also Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614–15 (1992); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1382 (8th Cir. 1993); *Millen Industries, Inc. v. Coordination Council for North American Affairs*, 855 F.2d 879, 884 (D.C. Cir.

1988); *MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326, 1328–29 (9th Cir. 1984); *Texas Trading & Milling Corp. v. Federal Republic of Nigeria*, 647 F.2d 300, 309 (2d Cir. 1981).

A private party could not have loaned these two giant pandas to the United States. These black and white endangered wildlife can be found only in a few mountain ranges in the Sichuan, Shaanxi, and Gansu provinces of the People's Republic of China. See <http://pandas.si.edu/facts/bearfacts.htm>. They are a precious national treasure and are not a commodity traded in a private marketplace for commercial purposes. See 16 U.S.C. § 1538(a)(1)(F). This case is similar to *MOL, Inc. v. People's Republic of Bangladesh*, where the Ninth Circuit determined that Bangladesh's contract to license research monkeys was non-commercial:

MOL asserts that the activity here relates to Bangladesh's contracting to sell monkeys. It admits that licensing the exploitation of natural resources is a sovereign activity. It argues, however, that this suit arises not from license revocation but from termination of a contract. In essence, Bangladesh lost its sovereign status when it contracted and then terminated pursuant to contract terms. . . . Bangladesh was terminating an agreement that only a sovereign could have made. This was not just a contract for trade of monkeys. It concerned Bangladesh's right to regulate imports and exports, a sovereign prerogative. It concerned Bangladesh's right to regulate its natural resources, also a uniquely sovereign function. A private party could not have made such an agreement. MOL complains that this conclusion relies on the purpose of the agreement, in contradiction of the FSIA. But consideration of the special elements of export license and natural resource looks only to the nature of the agreement and does not require examination of the government's motives. In short, the licensing agreement was a sovereign act, not just a commercial transaction.

736 F.2d 1326, 1328–29 (9th Cir. 1984) (internal citations omitted). Like the research monkeys of Bangladesh, the giant pandas are a natural resource of the People's Republic of China. Because no private party could have provided these two giant pandas to a

zoological park, the *making* of such an agreement was “peculiarly sovereign.” Cf. *Janini v. Kuwait University*, 43 F.3d 1534, 1537 (D.C. Cir. 1995). See also *In re Sedco, Inc.*, 543 F. Supp. 561, 566 (S.D. Tex. 1982) (“A very basic attribute of sovereignty is the control over its mineral resources and short of actually selling these resources on the world market, decisions and conduct concerning them are uniquely governmental in nature.”), *vacated in part*, 610 F. Supp. 306 (S.D. Tex. 1984) (calling for hearing to determine whether oil drilling was for commercial or exploratory purposes), *remanded on other grounds*, 767 F.2d 1140 (5th Cir. 1985).

Research agreements between national instrumentalities deserve special protection under the FSIA. In *Cicippio v. Islamic Republic of Iran*, a case cited by Plaintiffs, the D.C. Circuit paid particular deference to agreements between two governments:

When two governments deal directly with each other *as governments*, even when the subject matter may relate to the commercial activities of its citizens or governmental entities, or even the commercial activity conducted by government subsidiaries, those dealings are not akin to that of participants in a marketplace. Governments negotiating with each other invariably take into account non-marketplace considerations—most obviously political relations—and so they cannot be thought to be behaving, in that setting, as businessmen.

30 F.3d 164, 168–69 (D.C. Cir. 1994); *but see Virtual Defense & Development Int’l, Inc. v. Republic of Moldova*, 133 F. Supp. 2d 1, 4 (D.D.C. 1999) (holding that Moldova acted as private party when it contracted with private company regarding sale of planes capable of firing nuclear weapons even though Moldova claimed that only sovereign nations own or sell such planes). Although courts have stated that government contracts to buy military supplies or to lease property are often commercial activities, *see, e.g., McDonnell Douglas Corp. v. Islamic Republic of Iran*, 758 F.2d 341, 348 (8th Cir. 1985); *De Letelier v. Republic of Chile*, 748 F.2d 790, 796 (2d Cir. 1984), such examples almost always involve one governmental and one private party. In contrast, the research agreement concerning the giant pandas is between two national instrumentalities.

The non-commercial nature of the research agreement between the CWCA and the National Zoological Park is further strengthened by the absence of an admission fee to see the giant pandas. In *World Wildlife Fund v. Hodel*, the district court did determine that an extra fee levied to see giant pandas in a zoo was “significant to a consideration of the CITES [international treaty] requirement that the import was not primarily for commercial purposes.” 1988 WL 66193 at \*4 (D.D.C. 1988) (memorandum opinion). But, contrary to Plaintiffs’ assertions, no fee is charged to see the two giant pandas at the National Zoological Park. See <http://pandas.si.edu/facts/gpfaqs.htm>. In addition, the National Zoological Park “must close the giant panda exhibit or must relocate both giant pandas to an off-public display enclosure if there is an indication that the public display of the animals interferes with the research as described in the [National Zoological Park]’s application [to import the pandas].” Special Conditions at ¶ 5.

“The concept of ‘commercial activity’ should be defined narrowly because sovereign immunity remains the rule rather than the exception, and because courts should be cautious when addressing areas that affect the affairs of foreign governments.” *Liberian Eastern Timber Corp. v. Government of Republic of Liberia*, 659 F. Supp. 606, 610 (D.D.C. 1987) (internal citation omitted). See also *City of Englewood v. Socialist People’s Libyan Arab Jamahiriya*, 773 F.2d 31, 37 (3d Cir. 1985) (finding that Libya’s purchase of a large residence was non-commercial because “[t]he record discloses no activity conducted for profit” at the residence); *United States v. County of Arlington*, 702 F.2d 485, 488 (4th Cir. 1983) (determining that embassy’s efforts to provide housing for its staff and their families “is devoid of profit motive in any ordinary sense”).

The primary nature of the agreement between the CWCA and the National Zoological Park is clearly to encourage research and conservation of giant pandas. Even if the standard is that all of the activity must be non-commercial, it is met in this case. All of the funds transferred to the CWCA for the two giant pandas must be used for research and conservation efforts or associated administrative expenses. See Research Agreement at 4.5; see also *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 16, 23 (D.D.C. 1999).

The Court should not interfere with a research agreement between two national instrumentalities that has no connection to

the underlying dispute in this case. The ten-year cooperative research agreement between the CWCA and the National Zoological Park is non-commercial. The funds and the pandas are thus immune from attachment or execution under the FSIA.

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## 8. Service of Process under the FSIA

On April 24, 2001 default judgments against the Russian Federation, Russian Ministry of Culture and Russian State Diamond Fund were vacated by the Fifth Circuit Court of Appeals because service of process on the foreign government instrumentalities had not been made in substantial compliance with the FSIA. *Magness v. Russian Federation*, 247 F.3d 609 (5th Cir. 2001).

The case had been brought by members of the Magness family, alleging the uncompensated expropriation of a piano factory and a mansion in St. Petersburg, both owned by the family before the Russian Revolution but expropriated by the Soviet government in 1918, and the expropriation of two antique pianos purchased in the 1990s in Russia. Family members met with Russian government officials in the 1990s in an unsuccessful attempt to regain their property. At that time, one of the family members purchased the two pianos but was not permitted to export them because they were deemed to be state treasures.

The Russian defendants did not timely appear before the U.S. District Court for the Southern District of Texas, which entered a default judgment in June 1999 for \$234.5 million. *Magness v. Russian Federation*, 54 F. Supp. 2d 700 (S.D.Tex. 1999). The court denied the Russian defendants' motion to have the default judgment set aside on the ground that procedures for service of process on a foreign state or its political subdivisions, agencies or instrumentalities set forth in section 1608 of the Foreign Sovereign Immunities Act were not followed by plaintiffs, finding that defendants had actual knowledge of the suit and that there had been substantial compliance with the service requirements of the FSIA. 79 F. Supp. 2d 765 (S.D.Tex. 2000).

On appeal, the Fifth Circuit held that Congress intended to require strict compliance with § 1608(a-b) as to service on foreign states and their political subdivisions, but that substantial compliance (“that is, actual notice of the suit and the consequences thereof”) could be sufficient with respect to agencies and instrumentalities of foreign states. 247 F.3d at 611.

In its Brief as *amicus curiae* supporting the Russian government defendants, filed May 30, 2000, the United States had set forth its interests in the case including: there is a substantial foreign affairs concern that the Foreign Sovereign Immunities Act (“FSIA”) be properly applied so that foreign states are brought into U.S. courts only pursuant to the conditions set by Congress in that statute; proper service of process increases the likelihood that foreign governments will appear in U.S. courts to defend the merits of claims against them, so that the claims may be resolved on the merits rather than through default judgments, which is clearly in the public interest; application of the service rules established for suits against foreign states will increase the likelihood that the United States will be treated properly in foreign courts; and, even if something less than full compliance were acceptable, in this case there had been neither substantial compliance nor actual notice to defendants.

The text of the U.S. *amicus* brief is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## STATEMENT

### A. The Applicable Statutory Scheme—The FSIA

\* \* \* \*

Significantly for this case, under the FSIA, “personal jurisdiction depends not only on the applicability of an exception to sovereign immunity but also on service of process in compliance with 28 U.S.C. § 1608.” *De Sánchez*, 770 F.2d at 1390 n.4. See 28 U.S.C. § 1330(b); *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983); *Argentine Republic*, 488 U.S. at

435 n.3. An understanding of the FSIA service of process provisions is therefore essential here.

The FSIA states clearly in Section 1608 (28 U.S.C. § 1608) the rules governing appropriate service on foreign states and upon their agencies and instrumentalities. (fn. omitted) The House of Representatives report on the FSIA reveals that these service of process provisions were the product of careful development after studies carried out by “[a] number of bar associations” and after consultation with the Departments of State and Justice. H.R. Rep. No. 1487, 94th Cong., 2d Sess. (1976), at 11 (*reprinted at* 1976 USCCAN 6604, 6609). (fn. omitted)

Of considerable importance here, this report further explains that “Section 1608 sets forth the *exclusive* procedures with respect to service on \* \* \* a foreign state or its political subdivisions, agencies or instrumentalities.” *Id.* at 23 (1976 USCCAN at 6622) (emphasis added). In addition, these service provisions were not crafted in isolation; they “are closely interconnected with other parts of the bill \* \* \*.” *Ibid.*

As described next, the FSIA established different methods of service, and Congress provided that “[t]here is a hierarchy in the methods of service.” *Id.* at 24 (1976 USCCAN at 6623). Thus, a plaintiff is to use the methods set out in Section 1608 in order. *Ibid.* Moreover, the rules differ depending upon the nature of the foreign sovereign defendant.

Under either set of rules, however, the methods of service prescribed by 28 U.S.C. § 1608(a) and (b) are mandatory—both subsections state that service “shall be made” in the manner specified—and 28 U.S.C. § 1608(c) provides that service shall be deemed to have been effected as of the date that a specific event occurs with respect to each method of service. See also Federal Rule of Civil Procedure 4(j)(1) (service on a foreign state or agency or instrumentality thereof “shall be effected” pursuant to 28 U.S.C. § 1608).

Service on a “foreign state or political subdivision of a foreign state” is controlled by Section 1608(a), which provides first for service pursuant to a special arrangement with the foreign nation at issue, or with an applicable international convention. (In this case, service on the defendants Russian Federation and Russian Ministry of Culture should be governed by Section

1608(a).) Neither of these special service provisions was available here.

When these methods are not available, service can be accomplished by “sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned \* \* \*.” 28 U.S.C. 1608(a)(3). Service shall be deemed to have been made under this method “as of the date of receipt indicated in \* \* \* the signed and returned postal receipt.” See 28 U.S.C. § 1608(c)(2).

The “notice of suit” required to be sent to the foreign state under paragraph (a)(3) (as well as paragraph (4), discussed below) is a notice “addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.” *Id.* at 1608(a). See 22 C.F.R. Part 93 (providing form and requirements of notice of suit).

The notice of suit is not a minor point; the House report addresses it specifically, explaining that “notice of suit is designed to provide a foreign state with an introductory explanation of the lawsuit, together with an explanation of the legal significance of the summons, complaint, and service.” H.R. Rep. No. 94-1487, *supra*, at 12 (1976 USCCAN at 6609). Accord *id.* at 24–25 (1976 USCCAN at 6623).

If service cannot be made under paragraph (3) within 30 days, the plaintiff may provide two copies of the necessary materials for the district court clerk to send to the Director of Special Consular Services at the United States Department of State, one copy of which is then to be transmitted through diplomatic channels to the foreign state. If this method is used, the State Department must send the district court a certified copy of the “diplomatic note” indicating when the papers were transmitted. *Id.* at 1608(a)(4). Service of process shall be deemed to have been accomplished under this method “as of the date of transmittal indicated in the certified copy of the diplomatic note.” 28 U.S.C. § 1608(c)(1).

Different rules apply for service on “an agency or instrumentality of a foreign state.” 28 U.S.C. § 1608(b). (That subsection appears to control service on defendant Russian State Diamond Fund.)



This section also provides first for service pursuant to special arrangement or convention. 28 U.S.C. § 1608(b)(1) and (2). If, as here, there is none, service can be accomplished by delivering a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized to receive service for the foreign agency or instrumentality involved. 28 U.S.C. § 1608(b)(2). If service cannot be made under paragraph (1) or (2), it can be made, “if reasonably calculated to give actual notice,” by delivery to an authority of the foreign state through a method designated in response to a “letter rogatory or request,” or by a form of mail requiring return receipt from the court clerk to the foreign agency or instrumentality to be served, or as otherwise determined by the court involved. 28 U.S.C. § 1608(b).

## **B. This Litigation and the Service Attempted by Plaintiffs**

\* \* \* \*

. . . [p]laintiffs did not follow the provisions set out in the FSIA governing service of process. Rather than requesting the clerk of the district court to send the summons, complaint, and notice of suit (together with a translation of each) by mail, with return receipt, to the head of the Russian foreign ministry (as required for service on the Russian Federation and the Ministry of Culture) under 28 U.S.C. § 1608(a)(3), plaintiffs sent their complaint to the Texas Secretary of State for forwarding to Boris Yeltsin, the Russian Federation then-President, at the Kremlin, and directly to the Russian Deputy Minister of Culture in Moscow.

The record shows that some persons signed for these documents, but it gives no indication who did so, and provides no further evidence of any kind who in the Russian government might have seen these documents after that time and when. In addition, without first attempting service under Section 1608(a)(3), plaintiffs sent the complaint (directly, rather than by request to the district court clerk) to officials at the U.S. State Department, and they also transmitted the complaint to the private attorneys who had appeared at the TRO hearing.<sup>5</sup>

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<sup>5</sup> There is disagreement in the record on this point, but the private counsel who is listed in the district court docket sheet as counsel for the

. . . [S]ervice on the Russian government itself and its Ministry of Culture should have been sent by the clerk of the court to the head of the Russian foreign ministry, and, if that method did not succeed after 30 days, by the clerk of the district court by certified mail to a designated U.S. State Department official, who would then transmit it through diplomatic channels to the Russian state. Under Section 1608(b) (for service on the Russian State Diamond Fund), if service was not made on an authorized agent, the complaint should have been sent pursuant to instructions in response to a letter rogatory to the proper Russian agency official.

With respect to the Russian Federation and the Ministry of Culture, there is no evidence in the record that plaintiffs ever attempted to serve the Russian foreign ministry by the proper method—much less that the foreign minister actually received the required materials. In addition, after it received plaintiffs' summons and complaint, the State Department explicitly informed plaintiffs that it would not transmit the documents to the Russian foreign minister because plaintiffs had committed several errors; specifically, plaintiffs had failed to attempt service first under Section 1608(a)(3) through the clerk of the district court to the head of the Russian foreign ministry, to refer in the summons to the 60-day period in which the defendants must answer the complaint, and to provide a notice of suit conforming to State Department regulations. (The State Department requirements are available through the internet and were made clear to plaintiffs' attorneys.) The State Department gave plaintiffs' counsel advice on correcting these errors, and provided a contact should plaintiffs have questions. There is no evidence that plaintiffs' counsel ever responded.

The record also gives no indication that plaintiffs attempted to fix the deficiencies in service identified by the State Department in order to meet the FSIA rules for service on the Russian Federation or its Ministry of Culture. In addition, there is no evidence that plaintiffs sent the complaint in response to instructions following a letter rogatory, or requested the district court clerk

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Russian defendants (Brendan D. Cook) stated that plaintiffs were told he represented Russia only in the TRO proceedings, and could not accept service of process for Russia after those proceedings ended. R. at 345–47, 596–97.

to send the complaint properly to the Russian State Diamond Fund, in conformity with the separate requirements for service on that entity under Section 1608(b)(3).

\* \* \* \*

### ARGUMENT

\* \* \* \*

. . . [I]f substantial compliance is to be accepted by this Court for service under the FSIA, at a minimum it should require the plaintiff to demonstrate a good faith effort to comply with the methods prescribed by the FSIA, and have a justifiable excuse for its failure to succeed under these methods.

B. The record here cannot support a conclusion that there was substantial compliance with the FSIA service requirements.

First, as pointed out above, plaintiffs never provided or attempted to provide service, through the district court clerk, on the Russian foreign ministry. Second, when they asked the State Department to send the summons and complaint to the Russian defendants, they did not include the required notice of suit. Plaintiffs also have provided no evidence that they included the notice of suit in the documents they had the Texas Secretary of State forward either.

. . . Congress believed the Notice of Suit provision important, discussing it in both the Senate and House reports, and expressly delegating to the State Department in the FSIA the responsibility to determine its form by regulation. See 28 U.S.C. § 1608(a).

The Department of State did not transmit the summons and complaint to the Russian government because of the defects discussed above. Accordingly, there is no basis for concluding that plaintiffs substantially complied with the requirements of Section 1608(a)(4), much less that the Russian government received actual notice through the State Department.

The requirement for service on the foreign minister of the foreign state involved is essential, and the failure even to attempt it wholly undermines any claim of substantial compliance. That ministry is the one most likely to be familiar with the practices of other nations and the proper way to deal with those nations

and their judicial systems. Service on the foreign ministry is thus best calculated to obtain the appropriate and timely response from the foreign government. Service on the foreign ministry obviously reduces the likelihood of a summons, complaint, and notice of suit being lost in the bureaucracy of a foreign government, or of these documents not being treated with the necessary amount of gravity.

Thus, Congress enacted the FSIA—after consultation with bar associations and the Departments of State and Justice—in a way designed to minimize friction with foreign governments and to accomplish the goal of having foreign governments actually appear in our courts. Plaintiffs here disregarded that expert legislative judgment.

Compliance with the requirement of formal service on the foreign ministry of a foreign state is also critical to the United States as it responds to suits in foreign courts. The Office of Foreign Litigation in the Civil Division of the Department of Justice regularly opposes assertions of foreign jurisdiction that fall short of what the United States considers proper service under international practice. For example, we have opposed an assertion of jurisdiction through mere notice by publication, naming the United States Ambassador as a defendant, with a 15-day response time, and where the ambassador saw the notice (Venezuela). And, we have opposed jurisdiction where a foreign attorney simply telephoned our embassy and informed a secretary there that he was suing the United States Army (Honduras). Finally, we have also opposed jurisdiction where an AID mission secretary was merely handed an envelope concerning a suit (Peru, Bolivia).

In our view, none of these situations should constitute proper service. Moreover, the United States Government would not consider that it had been properly served if a foreign party merely provided the type of notice used here, such as delivery of a package addressed to “William Clinton, the White House,” and delivery to a Deputy Secretary of a specific agency—such as the Department of Transportation or the Department of Health and Human Services—that might have dealings with foreign states, but lacks centralized responsibility for foreign relations, and does not have expertise in dealing with foreign judicial systems.

Accordingly, the United States Government has a strong interest in foreign judicial matters being brought to its attention through

the State Department, which has a firmly established practice of coordinating expeditiously and efficiently with the appropriate office at the Department of Justice in dealing with such foreign matters. Service through other means runs a serious risk of delay and confusion, and is regularly opposed by the United States overseas.

This position is reinforced by generally accepted international practice, which does not even provide for the more liberal means of service in Section 1608(a)(3), through a form of mail requiring return receipt by the clerk of the district court on the head of the relevant ministry of foreign affairs (which, as explained above, plaintiffs did not attempt to follow here). (fn. omitted) Thus, Article 20 of the United Nations Draft Articles on the Jurisdictional Immunities of States and their Property (see Report of the International Law Commission on the Work of its 43rd Session (April-July 1991) of the United Nations General Assembly, at 145), explains that service of process is to be accomplished against a sovereign state, absent an international convention binding on that state or other means accepted by the state, by transmission through diplomatic channels to the Ministry of Foreign Affairs. And, the European Convention on State Immunity (11 I.L.M. 470 (1972)) provides in Article 16, that in a legal proceeding against a contracting state, competent authorities of the forum state shall transmit the documents by which such proceedings are instituted through diplomatic channels to the Ministry of Foreign Affairs of the defendant state. The same rule applies in, for example, the United Kingdom State Immunity Act of 1978 (17 I.L.M. 1123 (1978)), and the Pakistan State Immunity Ordinance of 1981 (U.N. Legislative Series, Materials on Jurisdictional Immunities of States and their Property (1982), at 24).

Thus, the United States through FSIA Section 1608(a)(3) has already provided a liberalized means of process. In light of accepted international practice, the courts of this country should not fashion an even more lax method of service, as the district court did here.

\* \* \* \*

C. Moreover, there is no evidence in the record to support the district court's conclusion that the Russian Federation, the Russian Ministry of Culture, or the Russian State Diamond Fund received actual notice.

The evidence placed in the record by the parties reveals that some persons—who might simply have been security guards at building entrances—signed at the Kremlin and the Ministry of Culture in Moscow for packages containing the summons and complaint here. In addition, the Texas Secretary of State notified plaintiffs’ counsel that copies of the summons and complaint had been sent by that office by registered mail to Boris Yeltsin in the Kremlin and to the Deputy Minister of Culture in Moscow, and that the return receipt bore the “Signature of Addressee’s Agent.” There is no record evidence that the documents were actually received by any Russian government official with responsibility for responding to a suit in a court in the United States, or any knowledge about how to do so.

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## **B. HEAD OF STATE IMMUNITY**

### **1. Immunity and Inviolability: *Tachiona v. Mugabe***

#### ***a. Immunity***

On October 30, 2001, the U.S. District Court for the Southern District of New York dismissed, on grounds of head-of-state and diplomatic immunity, actions brought under the Alien Tort Statute and the Torture Victims Protection Act against Robert Mugabe, the president of Zimbabwe, and Stan Mudenge, the Zimbabwean foreign minister. The court permitted the case to continue, however, against defendant Zimbabwe African National Union-Patriotic Front (“ZANU-PF”), the majority political party in Zimbabwe. *Tachiona v. Mugabe*, 169 F. Supp. 2d 259 (S.D.N.Y. 2001). Plaintiffs asserted that President Mugabe, Foreign Minister Mudenge and others, acting in their personal capacities and as senior officers of ZANU-PF, had planned and executed a campaign of violence, including extra-judicial killings and torture, designed to intimidate and suppress its political opposition, the Movement for Democratic Change (“MDC”). The complaint did not name Zimbabwe as a defendant, and thus the immunity issues in the case concerned the head-of-state and diplomatic immunity doctrines, not sovereign immunity.

In its Suggestion of Immunity, filed February 23, 2001, the United States had advised that President Mugabe and Foreign Minister Mudenge were immune from the jurisdiction of the Court because the Department of State had recognized and allowed their immunity as head of state and as foreign minister of a foreign country. The Suggestion further advised that courts of the United States are bound by such suggestions of immunity submitted by the Executive Branch. In addition, at the time service of process was made, President Mugabe and Foreign Minister Mudenge were serving as representatives of the Government of Zimbabwe to the United Nations Millennium Summit, and thus were entitled to diplomatic immunity under the Convention on Privileges and Immunities of the United Nations, adopted Feb. 13, 1946, United States accession, April 29, 1970, 21 U.S.T. 1418 (the "UN General Convention"), and the Vienna Convention on Diplomatic Relations, done April 18, 1961, United States accession, December 13, 1972, 23 U.S.T. 3227 (the "Vienna Convention."). Finally, the Suggestion of Immunity stated that under both the head-of-state and diplomatic immunity doctrines, President Mugabe and Foreign Minister Mudenge had "personal inviolability" and could not be served with legal process in any capacity, including on behalf of defendant ZANU-PF.

In a Memorandum of Law in Reply to Plaintiffs' Answering Brief Concerning Defendants' Immunity, filed June 1, 2001, the United States had elaborated on these positions. The excerpts provided below address 1) the binding and conclusive nature of Executive Branch suggestions of immunity for heads of state and foreign ministers; 2) the legal basis for head-of-state immunity for President Mugabe and Foreign Minister Mudenge and the inapplicability of the Foreign Sovereign Immunities Act in the head-of-state context; and 3) the applicability and importance of diplomatic immunity under United Nations agreements where the two individuals were in New York as Zimbabwean representatives to the United Nations. Internal citations to other pleadings in the case have been omitted.

The full text of the Suggestion of Immunity and the Memorandum of Law is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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## ARGUMENT

### POINT I

## DEFENDANTS MUGABE AND MUDENGE ENJOY HEAD-OF-STATE IMMUNITY FROM THIS SUIT

### A. This Court is Bound by the Executive Branch's Determination of Mugabe's and Mudenge's Head-of-State Immunity

#### The Executive Branch's Determination Binds the Court and Deprives It of Personal Jurisdiction Over Defendants Mugabe and Mudenge

The Executive Branch is empowered to make conclusive determinations of head-of-state immunity. The Supreme Court has repeatedly instructed courts that it is their “duty” to defer to Executive Branch suggestions of immunity, and that such suggestions are conclusive on the courts. *See Ex Parte Peru*, 318 U.S. 578, 589 (1943) (suggestion of immunity of vessel owned by foreign government “must be accepted by the courts as a conclusive determination by the political arm of the Government”); *see also United States v. Lee*, 106 U.S. 196, 209 (1882) (“the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction”); *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35–36 (1945).

Courts’ deference to the Executive Branch as to head-of-state immunity serves that doctrine’s underlying purpose, which “is founded on the need for mutual respect and comity among foreign states.” *See In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988) (citing *In re Grand Jury Proceedings, Doe No. 700*, 817 F.2d 1108, 1111 (4th Cir.), *cert. denied*, 484 U.S. 890 (1987)). The deference due Executive Branch suggestions of immunity also rests on consid-



erations arising out of the conduct of this country's foreign relations. *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974); *see also Lafontant v. Aristide*, 844 F. Supp. 128, 137 (E.D.N.Y. 1994) ("Both comity and the Executive's plenary role in fashioning foreign policy suggest that the State Department needs to retain decisive control of grants of head-of-state immunity"). As the Fifth Circuit has observed, "Separation-of-powers principles impel a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." *Spacil*, 489 F.2d at 619 (citing *United States v. Lee*, 106 U.S. at 209; *Ex Parte Peru*, 318 U.S. at 588). Further, in contrast to the institutional resources of the Executive Branch and the extensive experience of the Executive in administering the country's foreign affairs, the judiciary is "ill-equipped to second-guess" Department of State determinations concerning those interests. *Spacil*, 489 F.2d at 619; *see also In re Doe*, 860 F.2d at 45 (in comparison with judiciary, Executive Branch has constitutional authority and "greater experience and expertise" concerning foreign affairs).

Consistent with these concerns and the Supreme Court's repeated command, there is a uniform body of decisions recognizing the immunity of heads-of-state as to whom the Executive Branch files a suggestion of immunity. *See, e.g., First American Corp. v. Sheikh Zayed Bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996) (suggestion by executive branch of the United Arab Emirates' Sheikh Zayed's immunity determined conclusive and required dismissal of claims alleging fraud, conspiracy, and breach of fiduciary duty); *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994) (suggestion by Executive Branch of King Fahd's immunity as head of state of Saudi Arabia held to require dismissal of complaint against King Fahd for false imprisonment and abuse), *aff'd*, 79 F.3d 1145 (5th Cir. 1996); *Lafontant v. Aristide*, 844 F. Supp. 128, 132-33 (E.D.N.Y. 1994) (suggestion by Executive Branch of Haitian President Aristide's immunity held binding on court and required dismissal of case alleging President Aristide ordered murder of plaintiff's husband); *Saltany v. Reagan*, 702 F. Supp. 319, 320 (D.D.C. 1988) (suggestion by Executive Branch of Prime Minister Thatcher's immunity conclusive in dismissing suit that alleged British complicity in U.S. air strikes against Libya), *aff'd in part and rev'd in part*

*on other grounds*, 886 F.2d 438, 441 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 932 (1990); *Gerritsen v. de la Madrid*, No. CV 85-5020-PAR, slip op. at 7-9 (C.D. Cal. Feb. 5, 1996) (in suit against Mexican President de la Madrid and others for conspiracy to deprive plaintiff of constitutional rights, action against President de la Madrid dismissed pursuant to suggestion of immunity), *rev'd as to other defendants on other grounds*, 819 F.2d 1119 (9th Cir. 1987); *Estate of Domingo v. Marcos*, No. C82-1055V, unpublished Order at 2-4 (W.D. Wash. Dec. 23, 1982) (action alleging political conspiracy by, among others, then-President Ferdinand Marcos and then-First Lady Imelda Marcos of the Republic of the Philippines dismissed against them pursuant to suggestion of immunity); *Psinakis v. Marcos*, No. C-75-1725-RHS (N.D. Cal. 1975), *result reported in* Sovereign Immunity, 1975 *Digest of U.S. Practice in Int'l Law* § 7, at 344-45 (libel action against then President Marcos dismissed pursuant to suggestion of immunity); *Anonymous v. Anonymous*, 181 A.D.2d 629, 581 N.Y.S.2d 776, 777 (1st Dep't 1992) (divorce suit against head of state dismissed pursuant to suggestion of immunity); *Guardian F. v. Archdiocese of San Antonio*, Cause No. 93-CI-11345 (Tex. Dist. Ct. 1994) (suggestion of immunity required dismissal of suit against Pope John Paul II); *see also* 1 Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* 817 (2d ed. 1945) (fn. omitted) ("[N]ecessity demands that the interests of the foreign State should not be injured or embarrassed by subjecting to local process such a national representative as a president or a king. As a matter of practice, the head of a foreign State, who, as such, enters the territory of any other, enjoys . . . exemption from local jurisdiction"). While Plaintiffs suggest much of this case law is somehow less persuasive because it consists of "trial court decisions," the doctrine nevertheless is firmly established and has been recognized by every court to confront it.<sup>2</sup>

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<sup>2</sup> To the best knowledge of the United States, only one court, in readily distinguishable circumstances, has ever found a suggestion of immunity filed by the Executive Branch not to be binding on the court. *See Republic of the Philippines v. Marcos*, 665 F. Supp. 793 (N.D. Cal. 1987). In *Marcos*, the Executive Branch suggested immunity for Philippine Solicitor General Sedfrey Ordonez on grounds that he was a foreign government represen-

The Executive Branch's determination here is equally binding as to Defendant Mudenge, the Foreign Minister of Zimbabwe, as it is concerning President Mugabe. As a threshold matter, and contrary to Plaintiffs' suggestion that Zimbabwe's Foreign Minister is equivalent to other foreign government officials who have been held liable in civil suits here, foreign ministers have long been recognized to be entitled to treatment equivalent to a foreign head-of-state. See *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 138 (1812) (Marshall, C.J.) (under customary international law, "the immunity which all civilized nations allow to foreign ministers" is coextensive with the immunity of the sovereign); *Kim v. Kim Yong Shik*, Civ. No. 12565 (Cir. Ct., 1st Cir., Hawaii 1963) (recognizing immunity of foreign minister).

Moreover, the Executive Branch's conclusive authority as to head-of-state immunity extends to persons beyond the formal head-of-state. Upon the filing of a suggestion of immunity, head-of-state immunity has been applied to a foreign minister, see *Kim*; to spouses of heads-of-state, see *Estate of Domingo*, *supra*, slip op. at 2–4 (Mrs. Marcos of the Philippines), *Kline v. Kaneko*, 141 Misc. 2d 787, at 787, 535 N.Y.S.2d 303, at 305 (Sup. Ct. N.Y. Co. 1988) (Mrs. de la Madrid of Mexico), *aff'd w/o op.*, 154 A.D.2d 959, 546 N.Y.S.2d 506 (1st Dep't 1989), to the head of government, see *Saltany*, 702 F. Supp. at 320 (Prime Minister Thatcher of the UK), and to the royal heir, see *Kilroy v. Windsor* (*Charles, Prince of Wales*), No. C 78-291 (slip op. N.D. Ohio Dec. 7, 1978).

Acceptance of the Executive Branch's Suggestion of Immunity in this case will also comport with principles of international law. International legal authorities recognize that a head of one state is immune from the jurisdiction of another state in circumstances such as the visit in this case. See Lord Gore-Bush, ed., *Satow's*

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tative performing official functions and thus entitled to immunity. The Court construed the suggestion of immunity as a suggestion of both head-of-state immunity and of diplomatic status, and quashed service of a subpoena solely on the latter ground. 665 F. Supp. at 797–800. The United States had no occasion to appeal the *Marcos* court's basis for finding immunity because the court took the exact action urged by the United States, albeit on different grounds. Moreover, as the *Marcos* court stressed, that case did not involve either an actual head-of-state such as Mugabe, nor a foreign minister entitled to equivalent treatment, as is Mudenge. See 665 F. Supp. at 797.

*Guide to Diplomatic Practice* § 2.1 (5th ed. 1979) (“Satow’s Dipl. Practice”) (“head of state . . . entitled to wide privileges and . . . immunity”); Hall, *International Law* 175 (4th ed. 1895) (“A sovereign, while within foreign territory, possesses immunity”); *Mighell v. Sultan of Johore*, 1 Q.B. 149, 153 (Q.B. (Eng.) 1894) (see App. Auth.) (“[T]here is no precedent for saying that an independent sovereign ruler can be sued in our Courts.”).

In cases where head-of-state immunity is recognized and allowed by the Executive Branch, the action must be dismissed because the court lacks personal jurisdiction over the defendant—regardless of the types of claims at issue. See *Aristide*, 844 F. Supp. at 131 (“A head-of-state recognized by the United States government is absolutely immune from personal jurisdiction in United States courts”); *Doe v. Karadzic*, 866 F. Supp. 734, 738 (S.D.N.Y. 1994) (“Were the Executive Branch to declare defendant a head-of-state, this Court would be stripped of jurisdiction”), *rev’d on other grounds*, 70 F.3d 232 (2d Cir. 1995); see also *In re Doe*, 860 F.2d at 44 (“[t]he general rule of the head-of-state immunity doctrine is that such a person is immune from the jurisdiction of foreign courts”).

Plaintiffs have not identified a single case in which a court rejected an Executive Branch suggestion of the immunity of a head-of-state or foreign minister, and they appear not to dispute that the Executive Branch historically has been vested with authority over head-of-state immunity. Rather, they contend primarily that the 1976 adoption of the FSIA transferred responsibility for all foreign immunity decisions to the courts, and marked a change from “absolute” to “restrictive” immunity for heads-of-state. Plaintiffs’ contention is incorrect, as demonstrated in the following section.

## **B. The FSIA Alters Neither the Substance Nor the Executive Branch’s Authority as to Head-of-State Immunity**

### **1. The FSIA Governs the Immunity of Foreign States and Leaves the Immunity of Heads-of-State Undisturbed**

Particularly given the body of international and domestic law precluding one nation’s courts from exercising jurisdiction over another nation’s head-of-state, the FSIA’s text cannot fairly be

read to revise this long-established consensus by permitting courts to exercise jurisdiction based on factors entirely distinct from those governing head-of-state immunity. Rather, both its text and its legislative history demonstrate an intent not to disturb established practices concerning heads-of-state.

In the FSIA, Congress “f[ound] that the determination by United States courts of the claims of *foreign states* to immunity [from jurisdiction] would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.” 28 U.S.C. § 1602 (emphasis added). The same provision further observed that “[u]nder international law, *states* are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned. . . . Claims of *foreign states* to immunity should henceforth be decided by courts of the United States. . . in conformity with the principles set forth in this chapter.” *Id.* (emphasis added). Thus, the Congressional declaration of the FSIA’s purpose indicates an intent to subject *foreign states*—not heads of state—to judicial weighing of such states’ immunity or lack thereof, because of a particular Congressional concern with the determination of immunities as to commercial activities by foreign states. These reasons had nothing to do with the treatment of heads-of-state; rather, the main purpose of the FSIA was to respond to an increase in the conduct of commercial activity by foreign states or state-affiliated entities, which strained the capacity of the Executive Branch to make case-by-case immunity determinations in disputes involving such entities, and which deprived parties who dealt with foreign state-affiliated commercial entities of a predictable judicial avenue for the resolution of disputes. *See Aristide*, 844 F. Supp. at 137 (FSIA was “crafted primarily to allow state-owned companies, which had proliferated . . . , to be sued in United States courts in connection with their commercial activities”; FSIA “took these cases out of the political arena . . . while leaving traditional head-of-state and diplomatic immunities untouched”); *see also United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (“Because the FSIA addresses neither head-of-state immunity, nor foreign sovereign immunity in the criminal context, head-of-state immunity could attach in cases . . . only pursuant to the principles and procedures outlined in *The Schooner Exchange* and its progeny. As a result,

this court must look to the Executive Branch for direction on the propriety of Noriega's immunity claim"), *cert. denied*, 523 U.S. 1060 (1998).

Indeed, even the Second Circuit's decision in *In re Doe, supra*, which Plaintiffs emphasize for its characterization of head-of-state immunity as "amorphous" in scope, 860 F.2d at 44, in fact recognizes that the FSIA "makes no mention of heads-of-state." *Id.* at 45. Importantly, the Second Circuit in *Doe* recognized that "the judicial branch is not the most appropriate one to define the scope of immunity for heads-of-state," and that because the Executive Branch has constitutional authority over foreign affairs as well as "greater experience and expertise in this area," it follows that "the sensitive problems created by conflict between individual private rights and interests of international comity are better resolved by the executive, rather than by judicial decision." *Id.* The Second Circuit ultimately decided the immunity issue presented in *Doe*, but only because "[w]hen lacking guidance from the executive branch, as here, a court is left to decide for itself whether a head-of-state is or is not entitled to immunity." *Id.*

. . . The FSIA thus governs the immunity of "corporate and government entities—legal yet nonnatural 'persons.' Nowhere does the FSIA discuss the liability or role of natural persons, whether governmental officials or private citizens." *First American Corp.*, 948 F. Supp. at 1120 (quoting *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), *aff'd*, 946 F.2d 1564 (D.C. Cir. 1991)).

The FSIA's legislative history likewise contains no suggestion that Congress intended to depart from established doctrines and procedures governing head-of-state immunity, and, indeed, indicates an intent not to do so. . . .

## 2. A Uniform Body of Case Law Has Rejected Plaintiffs' Contention

Plaintiffs' argument that the FSIA shifted responsibility for determining the immunity of heads-of-state is further belied by the fact that United States courts since 1976 have uniformly dismissed suits against heads-of-state where the Executive Branch has filed a suggestion of immunity. On at least five such occa-

sions, courts specifically rejected the argument advanced by Plaintiffs here—that enactment of the FSIA authorized courts to reject Executive Branch suggestions of head-of-state immunity and to permit a suit to proceed. *See Aristide*, 844 F. Supp. at 132–33 (Executive Branch’s suggestion of immunity mandated dismissal of suit against Haitian President Aristide; enactment of FSIA did not alter controlling effect of suggestion of immunity); *First American Corp.*, 948 F. Supp. at 1119 (dismissing action against Sheikh Zayed on strength of Executive Branch suggestion of immunity; “enactment of the FSIA was not intended to affect the power of the State Department, on behalf of the President as Chief Executive, to assert immunity for heads of state or for diplomatic and consular personnel”) (citing *Aristide*); *Kline*, 141 Misc. 2d at 787, 535 N.Y.S.2d at 305 (enactment of FSIA did not affect binding nature of Executive Branch suggestion of immunity of head-of-state’s wife); *Gerritsen*, slip op. at 7–9 (dismissing complaint against President of Mexico on strength of Executive Branch Suggestion of Immunity; FSIA “does not refer to individual representatives of foreign governments” and “was not intended to affect the power of the State [D]epartment to assert immunity”); *Estate of Domingo*, slip op. at 3–4 (rejecting plaintiffs’ “principal argument in opposition to the Suggestion of Immunity” that adoption of FSIA was intended to “eliminate the Suggestion of Immunity procedure”; in fact, no evidence of such intent in legislative history, and the FSIA merely governs immunity of states, not heads-of-state). No court has held to the contrary in a case involving a head-of-state, and the only case in which a court held it was not bound by a suggestion of immunity rejected an argument that the FSIA procedures applied to the lower-ranking government official in that case. *See Marcos*, 665 F. Supp. at 797.

Particularly noteworthy for its thoroughness is Judge Weinstein’s decision in *Aristide*, which extensively evaluated the question of whether the FSIA modified the head-of-state immunity doctrine. After carefully reviewing the statute and legislative history, the court summarized its conclusions:

The FSIA was not designed to apply to diplomatic or other consular officials. Instead, it was crafted primarily to allow state-owned companies, which had proliferated in the communist world and in the developing countries, to be sued in

United States courts in connection with their commercial activities. *The FSIA took these cases out of the political arena of the State Department, while leaving traditional head-of-state and diplomatic immunities untouched.* Scholars have argued that the willingness of the State Department, which co-authored the FSIA, to continue issuing suggestions of immunity for heads-of-state, and the willingness of courts to defer to such suggestions evidences the FSIA's nonapplicability to heads-of-state. Both comity and the Executive's plenary role in fashioning foreign policy suggest that the State Department needs to retain decisive control of grants of head-of-state immunity, by preserving the pre-FSIA "absolute" theory of immunity. The language and legislative history of the FSIA, as well as case law, support the proposition that the pre-1976 suggestion of immunity procedure survives the FSIA with respect to heads-of-state.

844 F. Supp. at 137 (emphasis added). The Court should reach the same conclusion here.

This result comports not only with the FSIA's text and history, and with case law applying it, but also with the sound policy underlying both the immunity and the courts' deference to the Executive Branch in the immunity's application. In recognition of the potentially profound implications of the doctrine for the conduct of foreign policy, there is "a reluctance in the judiciary to interfere with or embarrass the executive in its constitutional role as the nation's primary organ of international policy." *Spacil v. Crowe*, 489 F.2d 614, 619 (5th Cir. 1974) (citing *United States v. Lee*, 106 U.S. at 209); see also *Ex Parte Peru*, 318 U.S. at 588 (same). . . .

### 3. Plaintiffs' FSIA Authority Is Inapposite

Plaintiffs' arguments that the FSIA completely superseded Executive Branch authority over all immunity questions are based either on faulty analysis of the FSIA, or on inapposite authority. First, Plaintiffs assert that the FSIA's definition of foreign states as including "legal persons" means that individuals, including heads-of-state, may constitute foreign states. This contention is



contrary to the common legal understanding of the term “legal person” to denote an artificial legal construct, as opposed to a “natural person” who is an individual. See *First American Corp.*, 948 F. Supp. at 1120 (FSIA governs immunity of “corporate and government entities—legal yet nonnatural ‘persons.’ Nowhere does the FSIA discuss the liability or role of natural persons”) (quoting *Herbage v. Meese*, 747 F. Supp. 60, 66 (D.D.C. 1990), *aff’d*, 946 F.2d 1564 (D.C. Cir. 1991)).<sup>4</sup>

The Ninth Circuit decision from which Plaintiffs derive much of their argument is inapposite. See *Chuidian v. Philippine Nat’l Bank*, 912 F.2d 1095 (9th Cir. 1990).

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### C. Plaintiffs’ Other Arguments Fail

#### 1. Whether Defendants’ Conduct Was Official or Unofficial Is Immaterial for Purposes of the Immunity of a Sitting Head-of-State

Plaintiffs argue at length that the conduct at issue was unofficial, and accordingly is not protected by immunity under the FSIA. But, as shown above, the applicability of head-of-state immunity here does not turn on whether the conduct giving rise to the proposed suit was official or unofficial. Head-of-state immunity, when suggested by the United States, renders the head-of-state personally immune from the jurisdiction of United States courts regardless of the acts giving rise to the lawsuit. This immunity exists independent of any immunity that may or may not be

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<sup>4</sup> Plaintiffs’ construction of the FSIA also is contrary to the internationally-accepted understanding of sovereign immunity laws here and elsewhere, and, further, would cause the United States to violate recognized international law. For example, while acknowledging the existence of restrictions adopted to the immunity of foreign states, particularly for commercial activities, one leading treatise went on to observe: “But none of this large and complex body of international law has been drawn up with the position of heads of state in mind. A clear distinction is drawn in the law of many states, and implied in the law of others, between the foreign state as a legal entity and the head of such a state as an individual.” *Satow’s Dipl. Practice* § 2.1. As to heads-of-state, “a very high degree of privilege and immunity remains due.” *Id.*

available under the FSIA, and renders irrelevant any cases holding that FSIA immunity is unavailable for officials whose unofficial acts give rise to lawsuits.

## 2. The Torture Victims Protection Act Does Not Trump Defendants' Immunities

One specific application of Plaintiffs' contention that the inapplicability of FSIA immunity permits this suit is their assertion of claims under the Torture Victims Protection Act ("TVPA"), Pub. L. 102-256, 106 Stat. 73 (Mar. 12, 1992) (28 U.S.C. § 1350 note), and the more-general Alien Tort Claims Act ("ATCA"), 28 U.S.C. § 1350. The TVPA subjects to suit an individual who, under color of law of a foreign nation, subjects an individual to torture or to extrajudicial killing, while the ATCA contains broader provisions permitting individuals to recover for torts committed abroad in some circumstances. *Id.*

While the statutory texts are silent as to heads-of-state, Plaintiffs' argument is explicitly negated by the TVPA's legislative history, which places it beyond debate that that statute had no effect on the head-of-state and diplomatic immunity doctrines. The leading Senate report on the TVPA stated: "The TVPA is not intended to override traditional diplomatic immunities which prevent the exercise of jurisdiction of U.S. courts over foreign diplomats . . . . Nor should visiting heads of state be subject to suits under the TVPA." S. Rep. No. 249, 102nd Cong., 1st Sess. 7-8 (1991). Similarly, the House report stated that "nothing in the TVPA overrides the doctrines of diplomatic and head-of-state immunity . . . . These doctrines would generally provide a defense to suits against foreign heads of state and other diplomats visiting the United States on official business." H.R. Rep. No. 367, 102nd Cong., 1st Sess., Pt. 1 (1991), 1992 U.S.C.A.N. 84, 88.<sup>6</sup>

The case law is to the same effect. Specifically, the *Aristide*

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<sup>6</sup> This legislative history also negates plaintiffs' theory that head-of-state immunity was subsumed by the FSIA. When considering the TVPA in 1991, Congress recognized and preserved the continuing vitality of the doctrine and preserved the continuing vitality of that doctrine when it adopted the TVPA fifteen years after the FSIA's adoption.

court explicitly considered and rejected a claim, identical to Plaintiffs,' that an extrajudicial killing was ordered by a head-of-state. The *Aristide* court reviewed the legislative history described above, and concluded that it need not consider whether the defendant's actions were official or private "because he now enjoys head-of-state immunity. The courts are barred from exercising personal jurisdiction over him." 844 F. Supp. at 139. Further, the court concluded that based on the clear legislative history, the TVPA does not "trump" head-of-state immunity. Rather, it held, the Executive's Suggestion of Immunity is controlling in head-of-state cases; whether defendant's alleged acts were private was "irrelevant" in the context of head-of-state immunity; and, while the court had subject-matter jurisdiction under the TVPA, it could not "exercise in personam jurisdiction over defendant because of his head-of-state immunity." *Id.* at 140.

In sum, because defendants' head-of-state and diplomatic immunity deprive this Court of personal jurisdiction, the TVPA and ATCA do not provide Plaintiffs an avenue for relief.

### 3. The Susceptibility to Suit of Sitting U.S. Presidents Is Irrelevant

Plaintiffs assert that their case is analogous to several cases, particularly *Clinton v. Jones*, 520 U.S. 681 (1997), which concern the susceptibility to suit of United States officials while in office. However, the principles that underlie the head-of-state immunity doctrine—that comity and the conduct of foreign relations dictate that one nation's courts not assume jurisdiction over another nation's leaders,—are simply not implicated in such cases. In short, head-of-state immunity protects one nation's leaders from the exercise of jurisdiction by another nation's courts. The extent to which leaders enjoy immunity from their own courts is a question for domestic law, not international law under the head-of-state immunity doctrine. Thus, the susceptibility to suit of former President Clinton or President Mugabe in their respective nations' courts does not raise the foreign affairs concerns central to the head-of-state immunity doctrine.

#### 4. Developments Involving International Criminal Tribunals Have No Bearing on Civil Suits within the United States

Plaintiffs also invoke article 27 of the Rome Statute establishing the International Criminal Court (“ICC”), which subjects sitting heads-of-state to the jurisdiction of that tribunal, as an indication that head-of-state immunity no longer exists under customary international law. Plaintiffs also point to U.S. support for prosecution of President Milosevic before the International Criminal Tribunal for the Former Yugoslavia (“ICTY”), including when he was a sitting head-of-state.

Contrary to Plaintiffs’ assertion, the ICC and ICTY initiatives are irrelevant to head-of-state immunity as that doctrine applies in civil cases such as this in national courts. Foremost, within the United States, courts are bound to accept a determination by the Executive Branch to suggest the immunity of a foreign head-of-state, and these international developments do not affect that rule. In any event, the jurisdiction of the tribunals referred to by Plaintiffs is limited to criminal jurisdiction which necessarily involves prosecution by governmental or governmentally-appointed authorities, and which presents issues entirely distinct from those created by private civil claims such as Plaintiffs’ here. Further, neither body referred to is a national court—the ICTY was established pursuant to a U.N. Security Council Resolution under Chapter VII of the U.N. Charter and the ICC is to be formed under the Rome Statute, an international agreement not yet in force and to which the United States is not a party. Therefore, their creation does not address the issue of national court jurisdiction.<sup>7</sup>

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<sup>7</sup> Foreign courts that have recently considered the matter, including in cases in Germany, France and the United Kingdom, have not found developments relating to the jurisdiction of international tribunals significant to the question of the immunity of a sitting head-of-state from criminal prosecution before domestic courts. *See Re Honecker*, 80 Int’l L. Rep. 365 (1984) (*see App. Auth.*); *Re Qadhafi*, Cour de Cassation (Supreme Court of Appeal, Criminal Div. (France), U.S. Dep’t of State Language Services Translation, at 2 (Mar. 13, 2001); *see also Ex parte Pinochet*, [2000] 1 A.C. 147. The United States notes there is no need to consider application of the head-of-state immunity doctrine in the criminal context in this civil action.

Finally, tribunals such as the ICTY derive their authority from the U.N. Charter, which empowers the Security Council to make binding determinations on member states where necessary to restore international peace and security, notwithstanding prior international law to the contrary. U.N. Charter, Art. 103. And the ICC statute, which will not have such international authority, acknowledges the prevailing principles of customary international law on head-of-state immunity.<sup>8</sup>

## 5. The “Act of State” Doctrine Does Not Apply Here

Resorting to cases involving the act of state doctrine, plaintiffs rely on language, drawn in particular from the Supreme Court opinion in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759 (1972), in which several Justices indicated reluctance to accept State Department “Bernstein letters” as conclusive with respect to the exercise of the Court’s jurisdiction.<sup>9</sup> However, the act of state doctrine is inapposite. In contrast to head-of-state immunity, which concerns the existence or non-existence of personal jurisdiction over a foreign head-of-state whose very recognition is constitutionally reserved for the Executive Branch, and which represents an obligation under customary international law, the act of state doctrine is a judicially-created princi-

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<sup>8</sup> See Article 27(2) of the Statute (“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”); see also Article 98 of the Statute (“The Court may not proceed with a request for surrender or assistance which would require a requested State to act inconsistently with its obligations under international law with respect to the State or diplomatic immunity of a person”).

<sup>9</sup> In act of state cases, the State Department may provide a so-called “Bernstein letter” advising the court that adjudication will not interfere with the conduct of foreign affairs. See *Bernstein v. N.V. Nederlandsche-Amerikaansche*, 210 F.2d 375 (2d Cir. 1954). In *First National*, three majority justices considered the Bernstein letter sufficient to allow adjudication, the four dissenting justices rejected the Bernstein letter and would have weighed additional factors, while the two remaining majority justices (who held in favor of the exercise of jurisdiction) would have considered other factors in addition to the “Bernstein letter.”

ple designed to avoid entangling the courts in the conduct of foreign affairs in cases in which courts have subject matter jurisdiction and personal jurisdiction over the parties. *See First National City*, 406 U.S. at 763 (“act of state doctrine represents an exception to the general rule that a court of the United States, where appropriate jurisdictional standards are met, will decide cases before it”); *see also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 418 (1964) (act of state doctrine “does not deprive the courts of jurisdiction once acquired over the case”) (quoting *Ricaud v. American Metal Co.*, 246 U.S. 304, 309 (1918)). The Supreme Court has explained the doctrine’s theoretical underpinnings:

We once viewed the doctrine as an expression of international law, resting upon “the highest considerations of international comity and expediency,” *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303–304 (1918). We have more recently described it, however, as a consequence of domestic separation of powers, reflecting “the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder” the conduct of foreign affairs, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

*W.S. Kirkpatrick & Co. v. Environmental Tectonics Corp.*, 493 U.S. 400, 404 (1990). The act of state doctrine does not address the court’s jurisdiction; rather, it concerns the question of when courts should defer to the political branches of government and, potentially, decline to exercise their existing jurisdiction. *See First City National*, 406 U.S. at 763 and 765 (doctrine affects cases “where appropriate jurisdictional standards are met”; doctrine originates in “the notion of comity” and is “buttressed by judicial deference to the exclusive power of the Executive over conduct of relations with other sovereign powers and the power of the Senate to advise and consent” to treaties).

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**POINT II****THE CONVENTION ON THE PRIVILEGES AND IMMUNITIES OF THE UNITED NATIONS CONFERS DIPLOMATIC IMMUNITY ON DEFENDANTS MUGABE AND MUDENGE**

Contrary to Plaintiffs' contention, the claims against defendants Mugabe and Mudenge should also be dismissed on the independent ground that each enjoys diplomatic, as well as head-of-state, immunity. Because defendants Mugabe and Mudenge were served while in New York as representatives of their nation to a United Nations proceeding, the potential assertion of this Court's jurisdiction raises serious concerns for the United Nations, for each of its member states, and for the United States as host to the U.N.'s world headquarters. It is no exaggeration to say that Plaintiffs' suit threatens the ability of the U.N. to carry out its functions effectively; were foreign leaders potentially subject to civil suit by aggrieved parties whenever they set foot in New York, they would face a powerful disincentive to attend to U.N. business at that body's headquarters.

**A. Plaintiffs' Reading of the U.N. General Convention Is Incorrect**

In recognition of, and to protect against, exactly the type of threat posed by this suit to the U.N.'s functioning, the United Nations Charter provides:

1. The Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes.
2. Representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.
3. The General Assembly may make recommendations with a view to determining the details of the application of paragraphs 1 and 2 of the Article or may propose conventions to the Members of the United Nations for this purpose.

United Nations Charter, Article 105. To give effect to Article 105, and pursuant to Article 105, paragraph 3, the U.N. General Assembly adopted the Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 21 U.S.T. 1419, 59 Stat. 1031 (entered into force April 29, 1970) ("U.N. Convention"). The U.N. Convention is a multilateral agreement to which some 140 States, including the United States, are party, and which imposes binding international legal obligations on all such States. *See El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155, 167 (1997) ("a treaty ratified by the United States is . . . the law of this land").

Plaintiffs contend that, particularly because section 11(a) of the U.N. General Convention grants one relatively narrow species of immunity to U.N. representatives, the broader provision of section 11(g) does not protect defendants Mugabe and Mudenge against this suit. This reading, however, would fail to give effect to the broad grant of immunity contained in subsection 11(g). In the view of the United States, it is fully compatible with the immunities granted under subsection 11(a) to also grant the immunities provided under subsection 11(g), so long as these additional immunities are not expressly excluded by section 11.

Even assuming *arguendo* that the text of section 11 could be interpreted as Plaintiffs urge, their reading is definitively negated by the history of the Convention's adoption by the United States. The report accompanying the Senate's advice and consent to ratification of the Convention makes clear that the United States intended by adopting the treaty to extend diplomatic level immunity to temporary representatives of Member States. *See* Report of the Committee on Foreign Relations, Exec. Rept. 91-17, 91st Cong. 2d Sess. (March 17, 1970). At hearings before the Foreign Relations Committee on March 9, 1970, State Department Legal Adviser John R. Stevenson described the effect the Convention would have on privileges and immunities for nonresident representatives:

At the present time resident representatives are already granted full diplomatic privileges and immunities under the headquarters agreement. Nonresident representatives, on the other hand, are only covered by the International Organizations Immunities Act and that grants them immunities relating to acts performed by them in their official capacity.



Under the convention, the nonresident representatives would also receive full diplomatic privileges and immunities.

The Chairman [Senator Fulbright]: They are the principal beneficiaries; is that right?

Mr. Stevenson: They are in terms of numbers the principal beneficiaries. There are about 1,000 of them who would be covered who are not now.

As Ambassador Yost [then the U.S. Permanent Representative to the U.N.] pointed out, many of the nonresident representatives are distinguished parliamentarians who come to New York for very short periods of time and we believe should be treated with the same respect as permanent representatives.

*Exec. Rept. 91-17, 11-12.*

In addition to this unambiguous indication that the Executive Branch viewed the Convention as creating broad immunities for temporary representatives to the U.N., the Senate Committee itself could not have been more clear on its understanding of the effect of ratification:

With regard to representatives of members, currently only resident representatives of permanent missions to the U.N. have full diplomatic immunities. Nonresident representatives enjoy only functional immunities; that is, immunities with respect to their official acts. *Under the convention, these nonresident representatives will also be entitled to full diplomatic immunities. The group covered here consists of foreign officials coming to the United Nations for a short time to attend specific meetings—such as the annual fall meetings of the General Assembly. Foreign ministers and other high government officials, distinguished parliamentarians, and representatives of that caliber, fall into this category, which is estimated to number about 1,000 persons a year.*

*Id.* at 3 (emphasis added). Defendants Mugabe and Mudenge are exactly the types of officials contemplated by this language as being afforded “full diplomatic immunities” under the Conven-

tion, and, at the time they were served, they were engaged in exactly the type of visit “for a short time to attend specific meetings” at the U.N. that the United States intended to render absolutely immunized. Indeed, Ambassador Yost had highlighted this very concern for the Committee:

I have long feared that a visiting dignitary to the United Nations might some day be involved in difficulties not of his own making and that the U.S. Government would be powerless to accord him the privileges which would be appropriate and which would be expected of us. Our ratification is long overdue.

*Id.* at 11. This Senate history leaves no doubt that both the Executive and Legislative branches understood and intended that section 11 extends diplomatic immunity to temporary representatives to the U.N., such as the individual defendants in this case.<sup>10</sup>

Were the United States to depart from this view, it might be the only State among 140 signatories to the Convention to deny such protection to temporary representatives. The U.N. and Member State representatives function on a global basis, and it is important that the Convention receive a common interpretation in all states where it applies. This is an important reason for the courts to defer to the interpretation of the U.N. Convention adopted by the United Nations and the United States. *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 185 (1982) (“[w]hen the parties to a treaty both agree to the meaning of a treaty provision, and that interpretation follows from the clear treaty language[, the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation”); *accord*, *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961) (courts give “great weight” to Executive Branch interpretation of treaty); *767 Third Avenue Associates v. Permanent Mission of Zaire*, 988 F.2d 295, 301–02 (2d Cir. 1993) (“federal courts must defer” to treaty interpreta-

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<sup>10</sup> Moreover, the United Nations agrees, as reflected in a 1976 statement of its Legal Counsel that, “taken as a whole, Section 11 of the Convention in fact confers, except for the exemptions [expressly excluded], diplomatic privileges and immunities on the representatives of Members.” 1976 U.N. *Juridical Yearbook* 227.

tion advanced by United States and not contradicted by any signatory to treaty).

Finally, the cases and other sources cited by Plaintiffs as supporting a more limited form of immunity under the Convention are inapposite because they involve U.N. officials (*i.e.*, staff of the U.N. Secretariat), not representatives of Member States. In *U.S. v. Enger*, 472 F. Supp. 490 (D.N.J. 1978), defendants were both employees of the U.N. Secretariat, see 472 F. Supp. at 496 (defendants were “attached to the [U.N.] Secretariat”); similarly, in the passage cited from Jencks, *International Law* at 114, the author is treating the immunities of officials of international organizations. Apart from the Secretary-General and other senior officials covered by section 19 of the Convention, U.N. officials are accorded privileges and immunities under section 18, not section 11. Section 18 contains no provision comparable to subsection 11(g), and U.N. officials enjoy substantially different immunities than Member State representatives. Thus, these cases are irrelevant here.

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#### **b. Inviolability**

In its decision, the district court dismissed the claims against President Mugabe and Foreign Minister Mudenge, but rejected the United States’ contention that the two officials could not be served with process on behalf of the Zimbabwean political party ZANU-PF due to their inviolability. *Tachiona*, 169 F. Supp. 2d at 308–09. The court held that service on a head-of-state or diplomat could be effective, at least “where a head-of-state or diplomat would not be subjected personally to a foreign court’s jurisdiction nor exposed to liability in that court.” *Id.* at 308. As a result, it found that delivery of papers to Mugabe and Mudenge constituted effective service on ZANU-PF; ordered that default judgment be entered against ZANU-PF; and ordered that an inquiry be held to determine the amount of damages owed by ZANU-PF. 169 F. Supp. 2d at 318. The United States moved for reconsideration of this aspect of the decision, seeking that the Court amend the Decision “insofar as it held that non-immune entities may be served by deliv-

ery of papers to individuals who possess inviolability under applicable treaties and who are affiliated with the non-immune entity.” The United States also reserved its rights of appeal of the Court’s rejection of the United States contention that the Court was bound by all aspects of the Suggestion of Immunity, including its advice that Mugabe and Mudenge enjoyed head-of-state immunity from service of process for all purposes. The excerpts set forth below from the Memorandum of Law in support of this motion, filed November 16, 2001, provide the United States views on inviolability to service of process in this case. The case was pending at the end of 2001. Internal citations to other pleadings in the case have been omitted.

The full text of the Memorandum of Law in Support of the United States’ Motion for Reconsideration is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## DISCUSSION

### THE COURT SHOULD RECONSIDER AND CHANGE ITS HOLDING THAT INVIOLEABLE DIPLOMATS AND HEADS-OF-STATE ARE SUBJECT TO SERVICE

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The Government respectfully submits that the Court “overlooked” and failed to give the legally-required “great weight” to the Executive Branch’s construction of “inviolability” as that term is used in the Vienna Convention on Diplomatic Relations. The Government informed the Court that “the State Department considers that personal inviolability under Article 29 of the Convention precludes the service of compulsory legal process on diplomatic agents,” and, further, observed settled precedent that “the meaning given [treaty provisions] by the departments of government particularly charged with their negotiation and enforcement is given great weight.” *Id.* at 34 (citing *Kolovrat v. Oregon*, 366 U.S. 187, 194 (1961)); *see also* Gov’t Reply Mem. at 31–32 (citing *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 184–85 (1982) (where parties to treaty agree to meaning of a

treaty provision, and interpretation “follows from the clear treaty language[, the court] must, absent extraordinarily strong contrary evidence, defer to that interpretation”), and citing 767 *Third Avenue Associates v. Permanent Mission of Zaire*, 988 F.2d 295, 301–02 (2d Cir. 1993) (“federal courts must defer” to treaty interpretation advanced by United States and not contradicted by any signatory to treaty)). This authority reflects clear and binding rules of judicial construction of treaty terms, including the applicable Article 29 of the Vienna Convention, by which courts are required to give an extremely high degree of deference to Executive Branch treaty constructions.

The Decision neither cites this authority nor exhibits any deference whatsoever to the Executive Branch’s construction of the relevant provision, in contrast to its explicit discussion and rejection of the Government’s separate contention that the Court was bound to follow the Executive Branch’s political foreign policy determination embodied in the Suggestion of Immunity as to the effectiveness of service on Mugabe and Mudenge. The Court’s failure to take into account the separate basis for decision, namely that courts must give “great weight” to Executive Branch treaty interpretations, likely controlled the outcome of the Decision as to the effectiveness of any service of process on Mugabe and Mudenge.

The Executive Branch’s construction of “inviolability” is logical, and is fully consistent both with the applicable treaty provision, and with the Vienna Convention as a whole. Moreover, as the Decision recognizes, there is “limited case law” construing inviolability as it relates to service of process, Decision 95–96, and what case law there is indicates that service may not be effected on inviolable officials. See *Aidi v. Yaron*, 672 F. Supp. 516, 517 (D.D.C. 1987); *Lafontant v. Aristide*, 844 F. Supp. 128, 130 (E.D.N.Y. 1994); *Vulcan Iron Works v. Polish Am. Machinery Corp.*, 472 F. Supp. 77, 78 (S.D.N.Y. 1979)); see also *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980–81 (D.C. Cir. 1965) (“the purposes of diplomatic immunity forbid service” on an ambassador even where summons at issue did not purport to join action against ambassador personally, but rather purported to join action against foreign sovereign state which the ambassador represented) (citing Vienna Convention, Art. 29); *Greenspan v. Crosbie*, 1976 WL 841 (S.D.N.Y. Nov. 23, 1976) (service of entity through immune officials “patently improper”) (citing *Hellenic Lines*).

The decisions in *Hellenic Lines* and *Greenspan* are particularly significant in light of the Court's distinction of the "limited case law" on point on the basis that here the defendant to be bound by the service of process is a non-immune entity whose representative happens to enjoy immunity and inviolability. See Decision 95–96. The plaintiff in *Hellenic Lines* was a shipper who sought to sue the government of Tunisia for damages arising out of an alleged delay in transit caused by that nation. The plaintiff secured a summons to be served on a Tunisian ambassador, who was not a defendant, with the intended effect of joining issue against Tunisia itself. As noted above, the D.C. Circuit squarely held that the ambassador's diplomatic immunity "forbid[s] service" on him, even for the limited purpose of giving notice to a separate entity with which the ambassador unquestionably was affiliated. *Hellenic Lines*, 345 F.2d at 981. Similarly, in *Greenspan* plaintiffs sought to sue a Canadian province, and attempted to serve process on visiting Canadian officials. The Court held that such service of process was "patently improper." 1976 WL 841 at \*2 (citing *Hellenic Lines*).

Indeed, the Second Circuit, in interpreting "inviolability" as the term is used in treaty provisions concerning the premises of diplomatic missions, characterized the term as "advisedly categorical" and "strong." 767 *Third Avenue Associates*, 988 F.2d at 298. Further, the Circuit held it was error for a district court to read into "the deliberately spare text of the Vienna Convention . . . an exception of its own making." *Id.* The Decision makes an identical error, and should be amended to cure it.<sup>2</sup>

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<sup>2</sup> The Government is also concerned that the Court may have misconstrued the Government as having supported an interpretation of the treaty that would permit personal service on diplomats who do not have substantive underlying immunity (e.g., the Article 31(1) exceptions). The United States submission does advise that a diplomat who is not immune from the civil jurisdiction of United States courts by virtue of the limited exceptions to immunity under Article 31(1) is subject to compulsory legal process. However, because that situation was not presented here, the United States expressed no view as to what method of service (e.g., by certified mail or through the diplomatic channel) would be consistent with the diplomat's personal inviolability. Rather, because Mugabe and Mudenge have immunity without exception, the United States informed the Court that no form of service upon them is permissible under the treaty.

Finally, even setting aside—without waiving for purposes of appeal—the Government’s disagreement with the Court’s conclusion that it had authority to assess foreign policy judgments encompassed in the Suggestion of Immunity, we note that the Court’s failure to give deference to the Executive Branch’s treaty interpretation is likely to interfere with the conduct of foreign affairs, contrary to the Court’s conclusion that deeming service effective here serves an “overarching end . . . at negligible sacrifice of the leader’s public dignity . . . , and without hindrance to the performance of governmental roles.” Decision at 107.

On a practical level, the ruling will give rise to vexatious and embarrassing assaults on the dignity of foreign leaders and diplomats, as individuals who wish to protest or humiliate such officials will be able through simple artifice to plead a complaint against a nongovernmental entity with which an official allegedly is affiliated, and then to publicize and stage a highly-visible service of process on the visiting dignitary. Contrary to the Decision’s suggestion that such a service of process would cause minimal inconvenience, the diplomat or other official would be significantly diverted from performance of his or her foreign relations functions. At a minimum, he or she would need to take the time needed to ascertain the significance of the documents, to decide whether local counsel should be consulted, both on the validity of service on an inviolable individual under local law, and on any other issues arising under the local legal system, to determine what action on his part, if any, the papers required, and finally to take such action as might be required in the circumstances.

Moreover, the United States anticipates that such a practice would give rise to sharp diplomatic protest, not only from nations whose leaders are targeted with such incidents, but from other nations which will be apprehensive about their officials being subjected to similar incidents, and even from the United Nations if representatives to that organization are involved. Such incidents also raise serious security issues, a critical and undeniable aspect of the conduct of diplomacy. Finally, the United States has grave concerns about the Decision’s possible implications for the United States’s conduct of foreign affairs overseas, by creating a justifi-

cation for other nations to subject United States officials to service of process when functioning abroad.<sup>3</sup>

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## 2. Other Head-of-State Litigation

On March 28, 2001, the United States filed a Suggestion of Immunity advising that Queen Rania al Abdullah of Jordan was immune from the jurisdiction of the Court in a suit arising in a dispute over use of photographs taken by plaintiff of the Jordanian royal family. The Suggestion advised that the Department of State had recognized and allowed her immunity as the spouse of a head of state and that courts of the United States are bound by such suggestions of immunity submitted by the Executive Branch. Claims against the Queen were dismissed by order of the court on June 13, 2001. Subsequently, the court dismissed certain of the claims against the Office of the Queen and three of its employees under the FSIA because they lacked a sufficient nexus to commercial activity, holding however that other acts did come within the FSIA's commercial activity exception. *Leutwyler v. Office of Her Majesty Queen Rania al-Abdullah*, 184 F. Supp. 2d 277 (S.D.N.Y. 2001).

On August 15, 2001, the United States filed a similar Suggestion of Immunity in *ABC Information Inc. v. Loyd*, Civil Action No. CV-01-03456-GHL, Central District of California, advising the Court of the immunity of President El-Hadj Omar Bongo as the sitting head of state of the Gabonese Republic. On August 24, 2001, the Court dismissed President Bongo

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<sup>3</sup> The United States expressly disavows the Court's characterization of ZANU-PF as an "intended beneficiary" of the [U.S.] Government's position here. Decision at 99. It is of course true that, in the unique posture of this case, ZANU-PF stands to benefit from the Government's position, assuming plaintiffs cannot accomplish service by other means. However, as the United States has made clear throughout these proceedings, its purpose in making submissions in this matter has been solely to protect the United States' vital interests in ensuring the unfettered conduct of bilateral and multilateral diplomacy; in pursuing comity among nations and, through principles of reciprocity, proper treatment of our representatives abroad; and in complying with treaty requirements to which we are a signatory.



from the action, and on November 13, 2001, denied plaintiff's request for reconsideration of that decision.

### C. DIPLOMATIC AND CONSULAR PRIVILEGES AND IMMUNITIES

The United States filed a Statement of Interest in *Ibeh v. Ibeh*, FL 18-338, setting forth its view that the Maryland District Court had no jurisdiction to issue its June 15, 2001 Protective Order against Mr. Bede Ibeh, or the dependent members of his household who had been notified to the Department of State. A Protective Order had been entered by the court even though the court had been informed that Mr. Ibeh was notified as a counselor at the Embassy of the Federal Republic of Nigeria and, as a diplomatic agent, was entitled to immunity from civil and criminal jurisdiction of the United States pursuant to the Vienna Convention on Diplomatic Relations.

The full text of the Statement of Interest is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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\* \* \* \*

The Vienna Convention extends to diplomatic officers, as well as family members forming part of their households, immunity from the jurisdiction of the court in the “receiving state,” in this case, the United States. Vienna Convention, arts. 31, 37. The special privileges and immunities accorded diplomatic agents by the Vienna Convention reflect a set of international standards developed by the world's community of nations to regulate and shape the conduct of international relations. *See generally*, 767 *Third Avenue Associates v. Permanent Mission of the Republic of Zaire*, 988 F.2d 295, 299–300 (2nd Cir.), *cert. denied*, 510 U.S. 819 (1993). The underlying concept of the Vienna Convention's treatment of privileges and immunities is that foreign diplomatic representatives cannot effectively carry out their responsibilities unless they are accorded a certain degree of insulation from the application of the laws of the host country. *See id.* One of the most

basic attributes of diplomatic immunity is that neither a diplomatic agent nor any member of his or her household is subject to the jurisdiction of the courts of the “receiving state.” *See id.*

\* \* \* \*

In this instance, the Department of State’s determination that Mr. Ibeh is a diplomatic agent entitled to immunity, communicated orally to the court by the State’s Attorney’s Office for Montgomery County, is consistent with the provisions of the Vienna Convention. Article 31 of the Vienna Convention, 23 U.S.T. 3227, reflecting customary international law, provides, in part, that a diplomatic agent enjoys immunity from the civil jurisdiction of the host country and “[n]o measures of execution may be taken in respect of a diplomatic agent” except in the three inapplicable exceptions set forth in Article 31.

\* \* \* \*

The United States is not taking a position on the allegations before this Court. However, failure to respect the immunities invoked in this case might have serious consequences. Indeed, if the court is allowed to “upset[] existing treaty relationships [by denying the defendant immunity,] American diplomats abroad [might] well be denied lawful protection of their lives and property to which they would otherwise be entitled.” *767 Third Ave. Assocs.*, 988 F.2d at 296. As a leading scholar on diplomatic law has noted, “the real sanction of diplomatic law is reciprocity. Every State is both a sending and a receiving State. Its own representatives abroad are hostages and even in minor matters their treatment will depend on what the sending State itself accords.” Eileen Denza, *Diplomatic Law* 2 (1976).

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## **D. INTERNATIONAL ORGANIZATIONS**

### **1. Principal Resident Representative for the International Monetary Fund**

In response to an inquiry from the Arlington County Commissioner of the Revenue, Arlington, Virginia, the Department of State provided information concerning the

privileges and immunities of the Principal Resident Representative of the International Monetary Fund ("IMF PRR") under the United States-United Nations Headquarters Agreement, set forth below.

The full text of Statement is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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\* \* \* \*

Your office is correct that the provisions of the International Organization Immunities Act, 22 U.S.C. 288 *et seq.*, would not grant sales or personal property tax exemption to such an individual. However, please be advised that the IMF PRR enjoys the privileges and immunities of a diplomatic envoy pursuant to Article V, Section 15(3) of the United States-United Nations Headquarters Agreement, 17 U.S.T. 74, 2319. Section 15(3) provides the privileges and immunities of a diplomatic envoy to the Principal Resident Representative to a specialized agency of the United Nations. The IMF is a specialized agency of the United Nations. . . . Accordingly, the IMF PRR is accredited as a diplomatic agent and enjoys treaty privileges and immunities, which would include the privilege of exemption from sales taxation and personal property taxation in the Commonwealth of Virginia.

## 2. Asian Development Bank

In response to an inquiry concerning tax exemption of the Asian Development Bank ("ADB") from the Hawaii Tourism Authority, the Department of State provided information concerning the Articles of Agreement of the ADB and its effect in U.S. law, as set forth below.

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As we discussed, the ADB enjoys tax exemption in the United States under its Articles of Agreement, 17 U.S.T. 1419, entered into force August 22, 1966. The United States is a party to the Articles of Agreement.

Under Article 56 of the Articles of Agreement, "The Bank, its assets, property, income and its operations and transactions, shall

be exempt from all taxation and from all customs duties. The Bank shall also be exempt from any obligation for the payment, withholding or collection of any tax or duty.” In accordance with this provision, the ADB would enjoy exemption from the general excise tax, hotel taxes, and liquor taxes in the State of Hawaii.

You inquired as to the legal authority for the Articles of Agreement to preempt state law. Authorization for United States membership in the Asian Development Bank and for implementation of the Articles of Agreement, including specifically its provisions on privileges and immunities for the ADB in the United States, was provided in Public Law 89-369, 89th Congress, March 16, 1966, a copy of which is enclosed. Section 9 of Public Law 89-369 provides that: “The agreement, and particularly articles 49 through 56, shall have full force and effect in the United States, its territories and possessions, and the Commonwealth of Puerto Rico, upon acceptance of membership by the United States in, and the establishment of, the Bank.” “Laws of the United States . . . and all Treaties . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby . . .” (the Supremacy Clause of the United States Constitution (Article VI)).

\* \* \* \*

## **E. OTHER ISSUES OF STATE REPRESENTATION**

### **1. Location of Diplomatic and Consular Buildings**

In January 2000, the District of Columbia Foreign Missions Act—Board of Zoning Adjustment (“FMBZA” or “the Board”) decided not to disapprove an application filed on behalf of the Embassy of the Republic of Benin to permit the location of a chancery in Washington, D.C. (*See also Digest 2000*, Chapter 10.D.1.b.) Neighbors of the planned site filed a challenge to the Board decision in the U.S. District Court for the District of Columbia. *2120 Kalorama Rd., Inc. v. District of Columbia Foreign Missions Act-Board of Zoning Adjustment*, Civil Action No. 00-1568. On January 3, 2001, plaintiffs moved for summary judgment, seeking to have the U.S. District Court for the District of Columbia vacate the Board’s decision. The United States, as intervening-defendant, moved

for summary judgment and opposed plaintiffs' motion for summary judgment on the grounds that the FMBZA decision should be affirmed as fully consistent with the Foreign Missions Act ("FMA") and the District of Columbia Administrative Procedure Act ("DCAPA").

The excerpts provided below explain the purpose of the Foreign Missions Act and set forth the argument of the United States requesting that the Board's Decision be affirmed.

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\* \* \* \*

### A. The Foreign Missions Act.

The Foreign Missions Act ("FMA") was enacted in 1982 "to address a serious and growing imbalance between the treatment accorded in many countries to official missions of the United States, and that made available to foreign government missions in the United States." S. Rep. No. 329, 97th Cong., 2d Sess. 1, reprinted in 1982 U.S.C.C.A.N. at 714. In addition to allowing the federal government to carry out its international treaty obligations to facilitate the operation of foreign missions in the United States, the FMA was intended to balance local and federal interests involved in the location and operation of foreign missions. *Embassy of the People's Republic of Benin v. District of Columbia Bd. of Zoning Adjustment*, 534 A.2d 310, 315 (D.C. 1987). To that end, "Congress recognized that the decision of chancery issues could have a substantial impact on United States interest abroad and was determined that the nation's international legal obligations should not be subject to negotiation by the acts or omissions of local officials. *Id.* (citing S. Rep. No. 283, 97th Cong., 1st Sess. 11-12 (1981); H.R. Rep. No. 102, 97th Cong., 1st Sess., pt. 1, at 34 (1981)). The final version of the FMA "reflects the Congressional intent to insure that the federal interest in foreign affairs is adequately weighed in the decision of chancery issues." *Id.* at 316.

The FMA sets forth criteria for the FMBZA to consider in determining whether to disapprove the location of a chancery within the District of Columbia. 22 U.S.C. § 4306(d); D.C. Code § 5-1206(d). These are the *sole* criteria for the Board's determination, and are as follows:

(1) The international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the Nation's Capital.

(2) Historic preservation, as determined by the Board of Zoning Adjustment in carrying out this section; and in order to ensure compatibility with historic landmarks and districts, substantial compliance with District of Columbia and Federal regulations governing historic preservation shall be required with respect to new construction and to demolition of or alteration to historic landmarks.

(3) The adequacy of off-street or other parking and the extent to which the area will be served by public transportation to reduce parking requirements, subject to such special security requirements as may be determined by the Secretary [of State], after consultation with Federal agencies authorized to perform protective services.

(4) The extent to which the area is capable of being adequately protected, as determined by the Secretary [of State], after consultation with Federal agencies authorized to perform protective services.

(5) The municipal interest, as determined by the Mayor of the District of Columbia.

(6) The Federal interest, as determined by the Secretary [of State].

22 U.S.C. § 4306(d); D.C. Code § 5-1206(d). These criteria are also incorporated into the District of Columbia's regulations setting forth the procedures of the Board with respect to chancery applications. 11 DCMR 1001.2-1001.8; 11 DCMR § 1002.4. In addition, to the extent that they are inconsistent with the FMA, the FMA specifically preempts laws concerning the location, replacement, or expansion of real property in the District of Columbia with respect to chanceries. 22 U.S.C. § 4306(j); D.C. Code § 5-1206(j).

The FMA thus reflects the need for federal participation inherent in decisions concerning the location of chanceries in the United States, an issue that was recognized from the FMA's inception:

Chanceries are the primary representational and functional offices of sovereign states accredited to the United States, which are required to be located in the capital city. Chan-

ceries are inviolable, perform government functions requiring special communications and security, and are entitled to special protection by virtue of treaty obligations.

The United States Government has an international obligation to facilitate the acquisition of acceptable and secure chancery locations in the capital city, which is directly related to reciprocal treatment of United States missions abroad, as well as to national security concerns here.

S. Rep. No. 329, 97th Cong., 1st Sess. 12, reprinted in 1982 U.S.C.C.A.N. 714, 725.

If important Federal concerns are not a significant part of the process in which the foreign government chanceries are located within the capital, the United States will find it difficult to insist on reciprocal treatment abroad. The City of Washington remains the Federal capital of our government, and there are obligations local officials must assume as a result which involve accommodating various Federal responsibilities in the capital. Anything less will undermine the Congressional purpose of this legislation.

*Id.* at 16, reprinted in 1982 U.S.C.C.A.N. 714, 729. It is against this backdrop that the Board makes its determination, and against this backdrop that this Court must consider the Board's decision not to disapprove the location of the Chancery of the Embassy of the Republic of Benin.

\* \* \* \*

## 6. Federal Interest

The Department of State strongly supported the application, and the Deputy Assistant Secretary of State had determined that a favorable determination on the application would serve the federal interest. Order at 14. The Board found that favorable determination on the application would aid the United States' international obligation to facilitate the location of foreign chanceries in the nation's capital as related to the reciprocal treatment of United States missions abroad. Order at 14.

\* \* \* \*

## **B. The Board's Decision.**

Plaintiffs' challenge to the FMBZA's March 3, 2000 decision not to disapprove the location of the chancery for the Embassy of the Republic of Benin boils down to a disagreement with the result. Plaintiffs urge this Court to revisit the reasoning behind the Board's decision, and attack the Board's decision on three grounds: that the Board failed to adequately account for 1) the municipal interest, 2) historic preservation concerns, and 3) parking and traffic considerations.<sup>6</sup> If taken to its logical conclusion, however, plaintiffs' argument would effectively render the FMA meaningless—plaintiffs essentially argue that municipal interests should trump federal concerns. As discussed more fully below, however, the FMBZA did thoroughly consider the three factors challenged by plaintiffs here; the fact that the Board reached a conclusion contrary to the one plaintiffs favor does not render its decision reversible. And, because the Board's decision was not arbitrary, capricious, or an abuse of discretion, and was supported by substantial evidence, its decision must be affirmed.

\* \* \* \*

In sum, the FMA was enacted in no small part to balance federal and local interests in the location and operation of foreign government chanceries within the District of Columbia, and to ensure that the federal interests were adequately represented. In their attempt to keep the Chancery of the Embassy of Benin out of their neighborhood, plaintiffs here seek to tip that balance back in favor of local interests and to convince this Court to substitute its judgment for that of the Board. However, where, as here, the Board held a hearing, carefully weighed all of the evidence before it, and came to a decision unquestionably supported by that evidence, this Court must affirm its decision and grant summary judgment to Intervening-Defendant United States of America.

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<sup>6</sup> Plaintiffs do not contest the Board's determination with respect to (1) the international obligation of the United States to facilitate the provision of adequate and secure facilities for foreign missions in the District of Columbia; (2) the extent to which the area is capable of being adequately protected; or (3) the Federal interest.



\* \* \* \*

## 2. Real Property Taxes

### a. Customary international law

Since the 1980s, the United States has taken the position that customary international law obligates a receiving state to exempt from real property taxes real property owned by a foreign government and used to house members of the diplomatic mission, on the basis of reciprocity. On that basis, it provided exemption for such property located in the United States effective January 1, 1987. In 2001, the United States responded to attempts by foreign governments in three countries to assess taxes on such property of the United States located in their respective countries. The following excerpts from a diplomatic note to Sweden, similar to one also sent to Jamaica, provide the views of the United States on the international legal obligation to provide tax exemption and the necessity to take any adverse action by a foreign government into account in United States practice.

The full text of the two diplomatic notes is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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The Department disagrees with the Ministry that “customary international law has [not] developed in this field.” Rather, after two exhaustive studies of international practice conducted by the Department, its Office of Legal Adviser, and United States embassies world-wide in 1980 and again in 1986, the United States Government published its position on international law exemption for diplomatic residences in the United States Federal Register dated July 30, 1986. That publication read as follows:

“In the opinion [of the Office of the Legal Adviser], the Department stated that its conclusion that ‘international law imposes a binding obligation to exempt such property from taxation’ was reached on the basis of its study of the sources of international law listed in Article 38(1) of the Statute of the International Court of Justice, ‘and in particular . . . the

current virtually uniform practice of states in implementation of the Vienna Convention. . . . [T]he survey reflected a general acknowledgment of a legal obligation to exempt such property on the part of states that are party to the Convention' . . . subject to reciprocal treatment of comparable property owned by the United States abroad."

After publication of the Federal Register notice, and as noted in the Embassy's earlier diplomatic note, the Department circulated a note to all missions on August 13, 1986, implementing its international legal determination. The Department also requested confirmation of reciprocal treatment of United States property abroad. As noted, the Government of Sweden confirmed exemption of United States diplomatic residential property in Sweden. On the basis of this representation, the Government of Sweden enjoyed exemption from costly annually recurring property taxes, as well as exemption for one-time transfer taxes associated with purchase or sale, on all of its real estate holdings of diplomatic residences in Washington, D.C., Maryland, and Virginia for over thirteen years.

As recently as 1997, the Department again surveyed all United States embassies regarding host State practice with respect to exemption from real estate related taxes imposed on properties abroad. Of the 160 embassy responses received by the Department, ninety-one percent (91%) of States exempt the United States Government from annual property taxes on diplomatic residences.

Additionally, the vast majority of States, over 75% and perhaps as high as 91% (the data is not more precise), exempt the United States from one-time property taxes associated with the purchase or sale of embassy residences.

Therefore, the Embassy reconfirms the position of the United States Government and restates that the nearly uniform custom and practice of States have ripened into a customary law obligation to provide tax exemption to Government owned residences housing members of the diplomatic mission, subject to reciprocity.

The Embassy asks for reconsideration of the position of the ministry of Foreign Affairs and the Ministry of Finance, for recognition of the international law obligation to grant tax exemption for 11 diplomatic residences purchased by the United States Government in 1997 and for the immediate removal and cure of

all adverse actions taken by the Government of Sweden stemming from non-payment.

The Department wishes this issue to be resolved to the benefit of both countries and not to become a subject for reciprocal action by the Department. However, the Department is required under the Foreign Missions Act to take reciprocity into account when considering the benefits provided foreign missions in the United States.

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**b. *Bilateral friendship and consular treaty***

In addition to the situations referred to in the notes regarding Sweden and Japan, issues of taxation of government-owned property used to house members of the diplomatic mission were expressly addressed in a 1934 bilateral U.S.-Finland Friendship and Consular Treaty. The excerpts below from a diplomatic note to Finland provide the views of the United States on the applicability of the bilateral treaty as well as the customary international law obligation discussed above.

The full text of the diplomatic note is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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The Embassy requests that the Government of Finland provide exemption from the 1.6 percent transfer tax assessed on the United States Government in connection with the purchase of shares . . . in a housing corporation . . . which will entitle the United States Government to take possession of six apartment residences to house members of the diplomatic mission.

The Embassy directs the attention of the Ministry to Article XXI of the 1934 bilateral treaty of friendship, commerce, and consular rights (Friendship and Consular Treaty) between the United States and Finland.

Article XXI provides in relevant part: “Lands and buildings situated in the territory of either high contracting party, of which the other high contracting party is legal or equitable owner and

which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, national, state, provincial and municipal, other than assessments levied for services or local public improvements by which the premises are benefited.”

Article XXI provides an expansive exemption from “taxes of every kind” related to lands and buildings used for governmental purposes. This treaty grant, precluding taxation, would apply to annually recurring real property taxes as well as one-time taxes associated with purchase or sale, such as transfer taxes on an acquisition of a chancery or diplomatic residence. The treaty exemption is not limited to mission premises but rather applies to taxes assessed on the treaty party in connection with all lands and buildings which are used for governmental purposes.

On numerous occasions in the past, the Republic of Finland has sought, and received, property tax exemption under Article XXI of the Friendship and Consular Treaty. . . . [For example], in a judicial action decided in 1966, *Republic of Finland v. Town of Pelham*, an appellate court in the State of New York upheld Finland’s claim for tax exemption for a residential property under Article XXI of the treaty.

\*   \*   \*   \*

In sum, the practice of a grant by the United States of property tax exemption to the Finnish mission in the United States under Article XXI of the Friendship and Consular Treaty is well established. This practice, together with the express text of the treaty, makes clear that Article XXI requires exemption from “taxation of every kind” related to property. As the Government of Finland has agreed in the past, exemption under the treaty is not limited to taxes on real property but also applies to taxes on other types of property such as personal property transfers.

The Government of Finland is accordingly called upon to reciprocate the treaty grant of property tax exemption historically allowed in the United States and to provide exemption from the 1.6 percent transfer tax otherwise levied on the United States Government in connection with the purchase of six apartment residences.

Further, as the United States Department of State announced in its note number 86-228, dated August 13, 1986, sent to all

diplomatic missions in Washington, D.C., the United States Government takes the position that customary international law obligates the receiving state to exempt from real property taxes real property owned by a foreign government and used to house members of the diplomatic mission, on the basis of reciprocity. Tax exemption would apply to annually recurring real property taxes or rates as well as one-time taxes associated with the purchase or sale of property such as transfer or recordation or stamp taxes. Consistent with Article 23 of the Vienna Convention on Diplomatic Relations and customary international law, tax exemption is limited to real property taxes which are the legal responsibility of the foreign government and which are not fees for specific services rendered. The vast majority of states recognize this international law obligation to provide tax exemption to government-owned embassy residences.

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### 3. Service of Process on Visiting Foreign Official

In *Feng Suo Zhou v. Li Peng*, 00 Civ.6446(WHP), plaintiffs brought suit against the former Premier of the People's Republic of China alleging human rights abuses due to his participation in the government's repressive response to Tiananmen Square protests in 1989. While Li Peng was in New York to attend meetings of the Inter-Parliamentary Union, plaintiffs made an *ex parte* application and secured an order, filed under seal, providing that "service shall be accomplished by delivering a copy of the summons and complaint to any employee of the United States government or its agencies who is guarding defendant Li Peng during his stay in New York. Said employee is to forthwith provide said defendant with the said copy of the summons and complaint during defendant's stay in New York." Order dated August 30, 2000 (unsealed by subsequent order of the Court) (the "August 30 order").

The United States explained in a Statement of Interest filed in the case on June 1, 2001, that it had not been informed of the August 30 order before Li Peng's departure from New

York for China late on the evening of September 1, 2000, and therefore had not had occasion to consider what action would be appropriate in response to any such order. Although a member of the United States protective detail provided by the Department of State and assigned to Li Peng received a copy of the summons and complaint, the papers were not served on Li Peng before his departure. Plaintiffs argued that the court should find that Li Peng had been validly served by delivery of the summons and complaint to the member of the protective detail. The excerpts from the United States Statement of Interest set forth below provide the views of the United States on the inappropriateness of an interpretation that would deem service to be complete upon delivery of the summons and complaint to United States protective detail personnel agents.

The full text of the Statement of Interest is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## DISCUSSION

At issue is the proper interpretation of the Court's August 30 order, which, as the Court has noted, contains at least a potential ambiguity as to whether it contemplates that service shall be complete upon the mere delivery of the summons and complaint to United States protective personnel, or whether service was to be complete only upon the contemplated ultimate delivery of the summons and complaint to Li Peng by United States protective personnel. *See* Transcript of hearing dated February 2, 2001 at 8–10. If the August 30 Order is construed to require actual delivery to Li Peng by protective personnel in order to complete service as authorized by that Order, then service has not been completed as contemplated in the Order because (as Plaintiffs at least assume *arguendo*,) there is no evidence that anyone delivered the summons and complaint to Li Peng. If, by contrast, the August 30 Order is interpreted to provide that service would be complete upon delivery of the summons and complaint to United States protective personnel, and if such service satisfies constitu-

tional due process requirements, then—because Plaintiffs did deliver the summons and complaint to Agent Eckert—service would be complete.

Plaintiffs have conceded that they themselves drafted the order. See Feb. 2, 2001 Tr. at 9. They state that the order is “patterned” after one which they inaccurately state was “sustained” by the Second Circuit in *Kadic v. Karadzic*, 70 F.3d 232, 246 (2d Cir. 1995).<sup>3</sup> Plaintiffs sought and obtained the August 30 Order pursuant to the alternative method of service provision applicable in New York,<sup>4</sup> which permits service upon natural persons “in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two and four of this section.” CPLR § 308(5).

The August 30 Order should not be read to deem service complete upon the mere delivery of the summons and complaint to United States protective personnel. As Plaintiffs recognize, to be valid, a method of service prescribed under CPLR § 308(5) must satisfy the due process requirements that the method afford “notice reasonably calculated, under the circumstances, to apprise the parties of the pendency of the action and afford them the opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); citing *Peralta v. Heights Medical Ctr., Inc.*, 485 U.S. 80, 84 (1988).

An order deeming service complete upon delivery to United States protective personnel, without more, would not meet this standard for constitutionally sufficient service. United States pro-

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<sup>3</sup> Contrary to Plaintiffs’ characterization, the Second Circuit’s decision in *Kadic* never “sustained” the order upon which Plaintiffs “patterned” their order; rather, in *Kadic* United States personnel personally delivered the summons and complaint to the defendant as contemplated in a district court order, so that neither the propriety of the method of service set forth in the order nor the validity of service in the absence of actual delivery to the defendant was at issue. See 70 F.3d at 246. The defendant in *Kadic* did not dispute that he personally received the papers at issue. *Id.* Instead, he contended that he enjoyed immunity from service of process. *Id.* The Second Circuit rejected this contention. *Id.* Thus *Kadic* has no bearing on whether service may ever be accomplished on any defendant solely by delivery to others assigned to protect that individual, and without actual delivery to the defendant.

<sup>4</sup> Fed. R. Civ. P. 4(e)(1) permits service on an individual “pursuant to the law of the state in which the district court is located.”

protective personnel are not agents of the foreign officials they protect for accepting service of process on behalf of those officials or for any other purpose; Plaintiffs do not contend to the contrary, whether by operation of law, international custom, or some specific arrangement with Li Peng in this case. To the contrary, United States protective personnel are United States employees fulfilling a sensitive mission on behalf of the United States, namely, to protect visiting dignitaries who are visiting this country. As was borne out by events in this case, the likely course of events should United States protective personnel be served with process directed at a foreign official is not that such personnel would promptly and without reflection relay the papers to their "protectee." Rather, such personnel should, and do, seek guidance from appropriate persons within the United States government, and act as directed by those United States officials. Accordingly, merely providing for the delivery of papers to United States protective personnel cannot be deemed "reasonably calculated" to provide Li Peng with notice and an opportunity to respond to the summons and complaint. *Cf. Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("doctrine of constitutional doubt" generally holds that "every reasonable construction [of a statute] must be resorted to, in order to save [it] from unconstitutionality") (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)); *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909) ("where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter").

Plaintiffs' recitation of a variety of cases upholding means of service that may not have resulted in actual notice to a defendant, is unavailing. Unsurprisingly, none of the cases cited is analogous to this one. The mere fact that corporations can be served through the New York Secretary of State as a statutorily-authorized agent of process has no bearing on this case, nor does the fact that individuals who have demonstrated that they are actively trying to evade service may at times be held adequately served even in the absence of actual personal delivery.



In addition, deeming protective personnel agents for service of process on foreign government officials would place extraordinary strains on the United States' already-difficult task of protecting visiting foreign dignitaries, and would significantly harm the United States' conduct of foreign relations. The accomplishment of the protective mission depends on the willingness of foreign dignitaries to permit United States protective personnel to have close access to them, and further depends on protective personnel enjoying the complete trust and cooperation of their protectees. Should the Court adopt procedures whereby any litigant seeking to sue a foreign official could accomplish service merely by serving papers on United States protective personnel, there is a serious risk that foreign dignitaries will stop permitting those personnel to operate near them, and will stop cooperating with them.

Moreover, and critically, adoption of such a construction would cause major strain in our nation's relations with foreign states. Any instances (which have not become numerous) where litigants seek orders authorizing service on United States protective personnel as agents of foreign officials exacerbate the foreign relations difficulties inherent in such suits. Precedent deeming service complete upon delivery to United States protective personnel would have the harmful effect of precluding the United States, in appropriate cases, from seeking to quash any *ex parte* orders seeking to compel service, including in certain cases on individuals who may enjoy immunity from the Court's jurisdiction, and from service of process. The judiciary should exercise great care not to impair the Executive Branch's conduct of foreign relations by adopting Plaintiffs' construction here, which would have the effect of making protective detail personnel agents for service of process with no opportunity for the United States to know of the contents of the order, or to object to it.

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## Cross References

*Sovereign Immunity of American Institute on Taiwan in the United States*, Chapter 5.A.3.  
*Status of U.S. reconnaissance aircraft in China*, Chapter 12.A.6(3).



## CHAPTER 11

# Trade, Commercial Relations, Investment and Transportation

### A. TRANSPORTATION BY AIR

#### 1. Convention for the Unification of Certain Rules Relating to International Transportation by Air

In *Chubb & Son, Inc. v. Asiana Airlines*, 214 F.3d 301 (2d Cir. 2000), the United States Court of Appeals for the Second Circuit held that in 1995 the United States and the Republic of Korea were not in a treaty relationship under the Convention for the Unification of Certain Rules Relating to International Transportation by Air, done at Warsaw Oct. 12, 1929, 49 Stat. 3000, 137 T.S. No. 876, *reprinted in* 49 U.S.C. 40105 note) ("Original Warsaw Convention"). On June 25, 2001 the U.S. Supreme Court denied a petition for writ of certiorari in the case. 121 S.Ct. 2549. (2001).

The Original Warsaw Convention governs, among other things, the nature and scope of a carrier's liability for damaged or lost baggage or cargo. The Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, done at The Hague 28 September 1955 ("Hague Protocol"), 478 U.N.T.S. 371, amended certain aspects of the Original Warsaw Convention. The amendments included deletion of a requirement that the waybill list not only the place of departure and ultimate destination but also all the agreed stopping places as a basis for invoking the carrier liability limit for damaged or lost cargo.

The Original Warsaw Convention entered into force for the United States on October 29, 1934. The United States

signed but never ratified the Hague Protocol. The Republic of Korea (South Korea) was not in existence when the Original Warsaw Convention was signed and concluded, and it has never adhered to the Convention. South Korea is, however, a Party to the Hague Protocol, for which it entered into force October 11, 1967.

In 1995, Samsung Electronics Co., Ltd., contracted with Asiana Airlines to ship 17 parcels of computer chips from Seoul, South Korea, to San Francisco, California. The waybill for the 17 parcels provided for shipment on August 10, 1995 on a direct flight between those two cities. However, Asiana instead transported the parcels on another flight from Seoul to Los Angeles, and thereafter trucked the parcels to San Francisco. Upon delivery in San Francisco, two parcels, worth \$583,000 and weighing 35.3 kilograms, were missing. The Petitioner here paid an insurance claim for the value of the missing parcels and brought this case as subrogee of Samsung in the United States District Court for the Southern District of New York. The district court held that the United States and South Korea were both parties to a treaty composed of those articles common to the Original Warsaw Convention and the Warsaw Convention as amended by the Hague Protocol. In this analysis, the waybill requirement of the Original Warsaw Convention did not apply but the liability limitation was still effective. Accordingly, the court held that the respondent's liability was limited to \$706.

The Court of Appeals for the Second Circuit reversed and remanded the case for further proceedings. It found that there was no treaty relationship between South Korea and the United States, concluding that "no precedent in international law allows the creation of a separate treaty based on separate adherence by two States to two different versions of a treaty, and it is not for the judiciary to alter, amend, or create an agreement between the United States and other States." 214 F.3d at 314. The excerpts below from the brief of the United States as *amicus curiae* filed at the request of the Supreme Court provide the views of the United States supporting the court of

appeals decision. Internal citations to other pleadings in the case have been omitted.

The full text of the brief is available at [www.usdoj.gov/osg](http://www.usdoj.gov/osg).

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DISCUSSION

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1. The court of appeals correctly concluded that, at the time the dispute in this case arose, the United States and South Korea were not in a treaty relationship with each other under any of the treaties in the Warsaw Convention system. At that time, the United States and South Korea were party to two separate international agreements. The United States was a party to the Original Warsaw Convention. The United States was not, however, a party to the Hague Protocol. South Korea, on the other hand, was a party to the Hague Protocol. South Korea was not, however, a party to the Original Warsaw Convention. (fns. omitted)

a. The court of appeals correctly rejected petitioner’s contention that, by adhering to the Hague Protocol, South Korea necessarily also became a party to the Original Warsaw Convention. Interpretation of a treaty begins with its text. See *El Al*, 525 U.S. at 167. Article XIX of the Hague Protocol provides that, “[a]s between Parties to this Protocol, the Convention and the Protocol shall be read and interpreted together as one single instrument and shall be known as the *Warsaw Convention as amended at The Hague, 1955*.” Hague Protocol, art. XIX. That provision incorporates into the Protocol those provisions of the Warsaw Convention that were not amended by the Protocol in order to create a single, separate agreement that stands on its own. See Richard Gardiner, *Revising the Law of Carriage by Air: Mechanisms in Treaties and Contract*, 47 Int’l & Comp. L.Q. 278, 280 (1998) (explaining that “the Protocols do not simply introduce amendments to the original treaty. In effect \* \* \* they each produce a new composite version”). Article XXIII(2) of the Protocol provides that “[a]dherence to this Protocol by any State which is not a Party to the Convention shall have the effect of

adherence to the Convention as amended by this Protocol.” Hague Protocol, art. XXIII(2).<sup>8</sup> That provision clearly provides that, by adhering to the Protocol, a State becomes a party to the new stand-alone agreement, the Warsaw Convention as amended at The Hague, 1955.<sup>9</sup>

The text of Article XXIII(2) does not in terms exclude the possibility that a State, by becoming a party to the new stand-alone agreement, also becomes a party to the Original Warsaw Convention with respect to States that are parties only to the Original Convention. The most natural reading of that Article, however, is that a State that is not independently a party to the Original Convention and adheres to the Protocol (such as South Korea) “become[s] party only to the Convention as amended, *not* to the unamended version as well.” Gardiner, *supra*, 47 Int’l & Comp. L.Q. at 283. See also Richard Gardiner, *Carriage by Air in the U.S. Court of Appeals*, 1988 Lloyd’s Mar. & Com. L.Q. 151; Bin Cheng, *What is Wrong with the 1975 Montreal Additional Protocol No.3?*, 14 Air Law 220, 223 & n.4 (1989). That is the most natural reading, in our view, because it gives force to the words “as amended by this Protocol.” Hague Protocol, art. XXIII(2); see Gardiner, *supra*, 47 Int’l and Comp. L.Q. at 286. The express reference to the Convention “as amended by this Protocol” and the absence of any reference to the unamended Convention together support reading Article XXIII(2) to mean

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<sup>8</sup> Article XXI contains a parallel provision that applies to the States that signed and ratified the Protocol to bring it into force. That provision states that:

Ratification of this Protocol by any State which is not a Party to the Convention shall have the effect of adherence to the Convention as amended by this Protocol. Hague Protocol, art. XXI(2).

<sup>9</sup> “[M]ultilateral treaties such as the Warsaw Convention, \* \* \* frequently are modified—but not thereby terminated—by ‘amend[ing] agreements binding only those parties that were willing to accept the amendment while leaving the original or earlier amended agreement still in force to govern relations between the other parties, as well as between the other parties and the amending group. As a result, it has become fairly common for several versions of a multilateral treaty to exist simultaneously, with different sets of provisions operating between various groups of States.’” *Fujitsu Ltd. v. Federal Express Corp.*, 247 F.3d 423, 433–434 (2d Cir. 2001) (quoting Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28 Va. J. Int’l L. 281, 361–362 (1988)).

that a State that adheres to the Protocol does not on that basis alone become a party to the unamended Convention. Cf. *United States v. Erika, Inc.*, 456 U.S. 201, 208 (1982). Under that reading, South Korea does not have a treaty relationship with the United States under the Original Convention.

We are not prepared to say that the reading that we advance is the only possible one. Some commentators have given Article XXIII(2) a different reading, under which adherence to the Hague Protocol puts a State that has not adhered independently to the Original Warsaw Convention on the same footing as a State that has adhered to both the Original Convention and the Protocol. If Article XXIII(2) had that meaning, then a State that has adhered to the Protocol (such as South Korea) would have a treaty relationship under the Original Convention with a State (such as the United States) that has adhered only to the Original Convention. See, e.g., Elmar Giemulla et al., *Warsaw Convention* 24 (1992); Lawrence B. Goldhirsch, *The Warsaw Convention Annotated: A Legal Handbook* 12 (1988); Rene H. Mankiewicz, *The Liability Regime of the International Air Carrier* 3 (1981).

This Court's precedent, however, establishes that courts must give effect to the most natural reading of a treaty unless secondary indicia (such as the drafting history) clearly establish that an alternative reading is a correct one. See *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134 n.5 (1989) ("Even if the text were less clear, its most natural meaning could properly be contradicted only by clear drafting history."). That approach to treaty interpretation is mandated by the separation of powers: "to alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on [the courts'] part an usurpation of power, and not an exercise of judicial functions." *The Amiable Isabella*, 19 U.S. (6 Wheat.) 1, 71 (1821) (Story, J.).<sup>10</sup>

<sup>10</sup> In the court of appeals, petitioner argued (Pet. App. 18a-19a) that South Korea should be deemed a party to the Original Warsaw Convention by virtue of Article 40(5)(b) of the Vienna Convention on the Law of Treaties, May 23, 1969 (Vienna Convention), 1155 U.N.T.S. 331. That provision states that "[a]ny State which becomes a party to [a] treaty after the entry into force of [an] amending agreement shall, failing an expression of a different intention by that State, \* \* \* be considered as a party to the unamended treaty in relation to any party to the treaty not bound

We have found nothing in the drafting history of the Hague Protocol that suggests that Article XXIII(2) was intended to mean that a State that adheres only to the Protocol necessarily also becomes a party to the Original Warsaw Convention. Nor does the “postratification understanding of the contracting parties” (*El Al*, 525 U.S. at 167) support such a reading of Article XXIII(2). Rather, it suggests that the contrary, more natural reading is the correct one.

It has been the understanding of the Executive Branch of the United States that a State’s adherence to the Hague Protocol does not make the adhering State a party to the Original Warsaw Convention. See *Hyosung*, 624 F. Supp. at 729 (noting State Department’s view that South “Korea has not adhered to the Convention in its unamended form”); Civil Aeronautics Board, *Aeronautical Statutes and Related Material* 512 n.2 (1974) (stating that the “United States is *not* in treaty relations under the Convention with any [States that have adhered only to the Hague Protocol (such as South] Korea), since they are parties to the Convention *only as amended*”).<sup>11</sup> The State Department’s annual

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by the amending agreement.” Vienna Convention, art. 40(5)(b). Petitioner’s argument is incorrect for several reasons. First, the Vienna Convention (to which South Korea is a party but the United States is not) does not govern interpretation of the Hague Protocol. The Vienna Convention did not enter into force until 1980, and it provides that the rules it contains, unless they would apply under international law independently of the Convention, apply only to treaties concluded after the Convention’s entry into force. Vienna Convention, art. 4. The rule in Article 40(5)(b) would not apply independently because it was a newly-formulated rule and thus was not existing law at the time that the Hague Protocol was adopted. See Report of the International Law Commission on its Eighteenth Session 4 May–19 July 1966, part IV, commentary (13). Second, Article 40(5)(b) applies only when the treaty itself does not address the status of States that join after amendment. See *ibid.*; Vienna Convention, art. 40(5)(b) (“failing an expression of a different intention”). And, as we have explained, Article XXIII(2) of the Hague Protocol, read most naturally, provides that such States will be bound only by the Convention as amended by the Protocol.

<sup>11</sup> A 1991 letter signed by the Department of State’s Assistant Legal Adviser for Treaty Affairs noted that “Singapore is a party to the Warsaw Convention by reason of its adherence on November 6, 1967 to the Hague Protocol of 1955, which amends the Convention.” Letter from Robert E. Dalton to David M. Salentine (Oct. 10, 1991). The letter went on to state that “Article XXI of the Hague Protocol states that ratification of the Protocol by any state which is not a party to the Convention shall have the



publication *Treaties in Force* has consistently indicated that South Korea is not a party to the Original Warsaw Convention.<sup>12</sup>

Although *Treaties in Force* is not intended to be a statement of the Executive Branch's official position on treaty interpretation, see *Treaties in Force, supra*, at i, the Executive Branch agrees that the United States is not in treaty relations under the Original Warsaw Convention with States that have adhered only to the Hague Protocol. That view is entitled to "great weight" and "respect." *El Al*, 525 U.S. at 168; *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176, 184–185 (1982).<sup>13</sup>

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effect of adherence to the Convention, *as amended by the Protocol*." *Ibid.* (emphasis added). (In fact, according to status lists prepared by the International Civil Aviation Organization (ICAO) based on information provided by the Government of Poland, Singapore was a party to the Original Warsaw Convention in 1991 because it had independently adhered to that Convention on April 9, 1971.) To the extent the view in the 1991 letter is inconsistent with the view described in the text above, the State Department no longer adheres to the view in the letter.

<sup>12</sup> Before 1986, *Treaties in Force* did not list South Korea in any fashion among the countries that are party to the Warsaw Convention. See, e.g., U.S. Dep't of State, *Treaties in Force* 207–208 (1982). Beginning in 1986, in acknowledgment of the decisions in *Hyosung* and *In re Korean Air Lines Disaster of September 1, 1983*, the annual *Treaties in Force* reports have listed South Korea in a footnote to the list of parties to the Warsaw Convention. That footnote, however, makes clear the State Department's view that South Korea and other countries that have adhered only to the Hague Protocol "are parties to the [Warsaw] convention *as amended*; the United States is *not* a party to the amending protocol." *Treaties in Force, supra*, at 344 n.1.

<sup>13</sup> That view is apparently shared by the Government of Poland, the official depositary for both the Original Warsaw Convention and the Hague Protocol, as well as by the Legal Bureau of ICAO. See Letter from Dr. Ludwig Weber, Director, Legal Bureau, ICAO, to David Shapiro, Alternate Representative of the United States on the Council of ICAO (May 17, 2001). Although the views of the Legal Bureau of ICAO are not dispositive, the International Conference on Air Law at which the Hague Protocol was adopted was convened under the auspices of the ICAO, the international organization charged with oversight of the development of international civil aviation. See generally Convention on International Civil Aviation, 7 Dec. 1944. The same view was endorsed by Lord Jauncey of Tullichettle in *Holmes v. Bangladesh Bimani Corp.*, 87 I.L.R. 365, 387 (Eng. H.L. 1989) ("carriage from the territory of a state which is a party only to one Convention to the territory of a state which is a party only to the other is not covered by the rules of either Convention").

South Korea also does not consider itself to be a party to the Original Warsaw Convention. To our knowledge, South Korea expressed no understanding when it adhered to the Hague Protocol or at any time thereafter that its adherence to the Protocol made it a party to the Original Convention in its unamended form. To the contrary, in 1984, South Korea issued a letter indicating that this was not its understanding of its status.<sup>14</sup>

b. In 1986, the South Korean Supreme Court held that the United States and South Korea were in a treaty relationship under the Hague Protocol (rather than the Original Warsaw Convention). See *Hyundai Marine & Fire Ins. v. Korean Air Lines* (Korea S. Ct. July 22, 1986) (described in Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287; Tae Hee Lee, *The Current Status of the Warsaw Convention and Subsequent Protocols in Leading Asian Countries*, 11 Air Law 242, 243 (1986)). The Korean Supreme Court relied on the theory that a "State which is a party only to the [Original] Warsaw Convention can be regarded also as a party to the Hague Protocol considering the statement in Article 19 of the Protocol that the Convention and the Protocol should be read and interpreted together as one single instrument." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287; Tae Hee Lee, *supra*, 11 Air Law at 243.

That theory is plainly incorrect. It is not supported by the text of Article XIX of the Hague Protocol, which, by its terms, applies only "[a]s between the Parties to this Protocol." Hague Protocol, art. XIX. Article XIX thus does not bind a State that has not adhered to the Protocol to the terms of the Protocol. Indeed, Article XIX could not be read to make a State that has not ratified or otherwise adhered to the Protocol a party to the Protocol because that would "infringe[] the principle that States are bound only by treaties to which they have consented." Gardiner, *supra*, 47 Int'l & Comp. L.Q. at 287.

c. The court of appeals also properly rejected respondent's contention, which was accepted by the district court, that the United States and South Korea were both parties to a "Truncated Warsaw

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<sup>14</sup> The letter takes the position, adopted by the district courts in *Hyosung* and *In re Korean Air Lines Disaster of September 1, 1983*, that South Korea and the United States are in treaty relations under a truncated version of the Original Warsaw Convention that includes only those provisions of the Original Convention that were not amended by the Hague Protocol. As we explain . . . *infra*, that view is untenable.

Convention”—a supposed agreement comprised of those provisions of the Original Warsaw Convention that were not amended by the Hague Protocol. See Pet. Although two other district courts have also reached that conclusion, *Hyosung*, 624 F. Supp. at 727; *In re Korean Air Lines Disaster of September 1, 1983*, 664 F. Supp. at 1469, it is incorrect.

As the court of appeals explained, “[e]ven if it could be said that South Korea agreed to be bound by a subset of the Original Warsaw Convention when it adhered to the Hague Protocol, the United States did not agree to be bound by that same subset of provisions when it ratified the Original Warsaw Convention.” Pet. App. “The Original Warsaw Convention does not provide for partial adherence and the United States has not consented to partial adherence by any State, including South Korea.” The Original Convention was a “compromise between the interests of air carriers and their customers worldwide.” *El Al*, 525 U.S. at 170. Holding the United States bound to a judicially-created treaty that contains some features of that compromise (such as the limited liability in Article 22(2)) without other features (such as the detailed disclosure requirements in Article 8) would improperly rewrite the compromise to which the United States agreed. That course cannot be squared with the Constitution’s requirements for treaty-making.

2. The question whether a country that has adhered only to the Original Warsaw Convention (such as the United States as of 1995) has a treaty relationship with a country that has adhered only to the Hague Protocol (such as South Korea) does not warrant this Court’s review. There is no conflict among the courts of appeals on that question. Moreover, the issue is not likely to recur frequently. According to status lists prepared on May 17, 2001, by the International Civil Aviation Organization (ICAO) from information provided by the Government of Poland, only six States have adhered only to the Hague Protocol—El Salvador, Grenada, Lithuania, Monaco, South Korea, and Swaziland. Moreover, the United States is no longer a party only to the Original Warsaw Convention. After the dispute in this case arose, the United States also ratified Montreal Protocol No. 4, which incorporates and amends the provisions of the Warsaw Convention as amended by the Hague Protocol. Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air Signed at Warsaw

on 12 Oct. 1929 as Amended by the Protocol Done at The Hague on 28 Sept. 1955, Signed at Montreal on 25 Sept. 1975, art. XV.

A substantial number of air travel liability disputes will now be governed by Montreal Protocol No. 4, to which 51 States have adhered, as of May 17, 2001, according to ICAO's status list. The terms of Montreal Protocol No. 4 apply when "the places of departure and destination \* \* \* are situated either in the territories of two Parties to th[at] Protocol or within the territory of a single Party to th[at] Protocol with an agreed stopping place in the territory of another State." Montreal Protocol No. 4, art. XIV. "[T]he places of departure and destination" for round trips—a very common form of international air travel for passengers—are considered to be the same place. Thus, if a passenger buys a round-trip ticket to any country from the United States or one of the 50 other States that have adhered to Montreal Protocol No. 4, that protocol will govern liability arising from that trip whether or not the other country has adhered to that protocol.(fn. omitted)

The Original Warsaw Convention and the Hague Protocol each contains provisions parallel to Article XIV of Montreal Protocol No. 4. See Original Warsaw Convention, art. 1(2); Hague Protocol, art. I. Thus, even for disputes arising before Montreal Protocol No. 4 came into force, the question of the existence of bilateral treaty relations affects the applicability of the Original Warsaw Convention and the Hague Protocol only in the case of one-way travel. See, e.g., *Alexander v. Pan American World Airways, Inc.*, 757 F.2d 362, 363 (D.C. Cir. 1985); see also Br. in Opp. 9.

Moreover, a new stand-alone agreement that would replace the *entire* Warsaw liability regime was concluded in 1999 and is currently before the United States Senate for its advice and consent. See Convention for the Unification of Certain Rules for International Carriage by Air, Done at Montreal, May 28, 1999 (1999 Montreal Convention), S. Treaty Doc. No. 45, 106th Cong., 2d Sess. (2000). The 1999 Montreal Convention, would, if it becomes applicable, prevail over the rules established under the Original Warsaw Convention and all amending protocols, and become the unified liability regime for all international civil air transportation.

Finally, even if the question presented by the petition might warrant review by this Court at some point, this case is not an appropriate vehicle to address it. The case is interlocutory: the court

of appeals remanded for the district court to consider whether there is diversity jurisdiction. Moreover, acceptance of petitioner's theory that the United States and South Korea were in a treaty relationship under the Original Warsaw Convention would not affect the ultimate issue of respondent's liability. Respondent would face unlimited liability whether (as we and the court of appeals believe) no treaty applies or (as petitioner contends) the Original Warsaw Convention applies, because respondent did not comply with Article 8(c) of the Original Convention, which is a prerequisite to application of the liability limitation in Article 22(2). Original Warsaw Convention, art. 9.

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## **2. Multilateral Agreement on Liberalization of International Air Transportation**

On May 1, 2001, the United States signed the first multilateral agreement based on "Open-Skies" principles with Brunei, Chile, New Zealand, and Singapore, as explained in the Press Release of the U.S. Department of Transportation below.

The full text of the Press Release is available at [www.dot.gov/affairs/dot4101.htm](http://www.dot.gov/affairs/dot4101.htm). The full text of the Agreement is available at [www.state.gov/e/eb/tra/c661.htm](http://www.state.gov/e/eb/tra/c661.htm).

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"With this historic agreement we are beginning to move beyond the current system of bilateral aviation agreements and into the international aviation environment of the 21st century," [Secretary of Transportation Norman Y.] Mineta said. "It is especially significant that this new agreement involves the growing, strategically important Pacific Rim market. We invite other nations to join us in this effort to expand markets and break down barriers to trade."

The United States currently has bilateral Open-Skies agreements with 52 aviation partners, including the four countries joining it in the new multilateral agreement. Open-Skies agreements permit unrestricted service by the airlines of each side to, from and beyond the other's territory, without restrictions on where carriers

fly, the number of flights they operate, and the prices they charge. The agreement signed today provides for similar liberalization for all flights among the five countries for these countries' carriers.

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The multilateral agreement will offer three important benefits:

- **Provide a Competition-Enhancing Model for Future Agreements:** The multilateral agreement mirrors the enormously successful U.S. Open-Skies bilateral agreements, which permit unrestricted international air service between the United States and each bilateral partner. By expanding the Open-Skies model to the multinational level, the new agreement helps set the terms for the global marketplace and promotes the Open-Skies approach as an international standard to work towards.
- **Expand Carrier Access to Equity Financing:** Most bilateral agreements require that substantial ownership of each country's carriers be vested in that carrier's homeland nationals. However, this requirement had made it difficult for many foreign carriers, which do not have access to large domestic capital markets, to obtain cross-border financing. The multilateral agreement substantially liberalizes the traditional ownership requirement, thus enhancing foreign carriers' access to outside investment.
- **Streamline International Aviation Relations:** Aviation is currently governed by thousands of bilateral agreements between more than 180 countries. The multilateral agreement will provide a single, streamlined mechanism for broader exchanges of aviation opportunities. By joining one multilateral agreement, countries can avoid prolonged negotiation of numerous individual bilateral agreements.

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## **B. INTERNATIONAL CONVEYANCES**

### **Fiber Optic Cables**

Executive Order 11423 of August 16, 1968, as amended by Executive Order 12847 of May 17, 1993, requires Presidential permits to be obtained for “. . . the full range of facilities that

may be constructed and maintained on the borders of the United States.” ‘Facilities’ for which a Permit is required include oil pipelines, conveyor belts, facilities for the transportation of persons or things, bridges, and “similar facilities above and below ground.” The Executive Order authorizes the Secretary of State to issue Presidential Permits for these facilities. The authority has been delegated to the Under Secretary for Economic Affairs, Delegation of Authority 118-1, April 11, 1973. In recent years, the Executive Order has been interpreted to require a Presidential Permit for tunnels used as conduits for fiber optic and similar cables across the U.S.-Mexico border.

In March 2001 the Department of State determined that a permit would no longer be required with respect to cross-border fiber optic and other telecommunications cables that are either wrapped in protective material and laid in a trench rather than a tunnel or that cross the border in a “wholly encasing” tunnel, that is a tunnel with sufficient space to contain the enclosed cables and no other items. Guidance provided on the need for Presidential Permits for cross-border fiber optics is provided below in full:

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This letter is to inform you that the Under Secretary of State for Economic, Business and Agricultural Affairs has determined that the construction, connection, operation, or maintenance of tunnels that act as conduits and that “wholly encase” fiber optic or other telecommunications cables no longer require a Permit. We use “wholly encase” to mean those tunnels or pipes that have only sufficient space to contain the enclosed cables and no other items.

The Under Secretary further determined that trenched fiber optic or other telecommunications cables wrapped in High Density Polyethylene (HDPE) or similar protective covering across the Mexican and Canadian borders do not require a Permit. The person or entity connecting, operating or maintaining a cross-border tunnel that wholly encases a fiber optic cable is required to notify the Department of State upon cessation of the operation, connection or maintenance of the cross-border tunnel for the transmission of data over the fiber optic cables. Tunnels that do not “wholly encase” fiber optic or other telecommunications

cables or are proposed to be used for dual purposes require a Permit pursuant to EO 122847.

Independent of the Presidential permitting process, approval of the International Boundary and Water Commission and appropriate state authorities will still be required for all structures, cables, tunnels and other such facilities that cross the U.S.-Mexico boundary.

## **C. NORTH AMERICAN FREE TRADE AGREEMENT**

The database of the Office of International Claims and Investment Disputes in the Office of the Legal Adviser, Department of State, available at [www.state.gov/s/l](http://www.state.gov/s/l), provides extensive information on arbitrations under Chapter 11 of the North American Free Trade Agreement, 32 I.L.M. 289 (1993) ("NAFTA").

In order to include in this volume a broad range of the key issues addressed in the voluminous filings in the Chapter Eleven arbitrations during 2001, all of the footnotes, many of which are extensive, as well as internal citations to other pleadings, have been omitted from the excerpts provided in this section. The full texts, including the omitted footnotes and other citations, are available in the International Claims and Investment Disputes database.

### **1. NAFTA Free Trade Commission Interpretation**

#### ***a. Interpretation adopted***

On July 31, 2001, the Free Trade Commission adopted an interpretation of Chapter Eleven of the North American Free Trade Agreement to clarify and reaffirm the meaning of certain provisions relating to access to documents and the minimum standard of treatment in accordance with international law. The interpretation was signed for the United States by Robert B. Zoellick, United States Trade Representative. The interpretation provides as follows:

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Having reviewed the operation of proceedings conducted under Chapter Eleven of the North American Free Trade Agreement, the Free Trade Commission hereby adopts the following interpretations of Chapter Eleven in order to clarify and reaffirm the meaning of certain of its provisions:

**A. Access to documents**

1. Nothing in the NAFTA imposes a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration, and, subject to the application of Article 1137(4), nothing in the NAFTA precludes the Parties from providing public access to documents submitted to, or issued by, a Chapter Eleven tribunal.
2. In the application of the foregoing:
  - (a) In accordance with Article 1120(2), the NAFTA Parties agree that nothing in the relevant arbitral rules imposes a general duty of confidentiality or precludes the Parties from providing public access to documents submitted to, or issued by, Chapter Eleven tribunals, apart from the limited specific exceptions set forth expressly in those rules.
  - (b) Each Party agrees to make available to the public in a timely manner all documents submitted to, or issued by, a Chapter Eleven tribunal, subject to redaction of:
    - (i) confidential business information;
    - (ii) information which is privileged or otherwise protected from disclosure under the Party's domestic law; and
    - (iii) information which the Party must withhold pursuant to the relevant arbitral rules, as applied.
  - (c) The Parties reaffirm that disputing parties may disclose to other persons in connection with the arbitral proceedings such unredacted documents as they consider necessary for the preparation of their cases, but they shall ensure that those persons protect the confidential information in such documents.
  - (d) The Parties further reaffirm that the Governments of Canada, the United Mexican States and the United States of America may share with officials of their respective

- federal, state or provincial governments all relevant documents in the course of dispute settlement under Chapter Eleven of NAFTA, including confidential information.
3. The Parties confirm that nothing in this interpretation shall be construed to require any Party to furnish or allow access to information that it may withhold in accordance with Articles 2102 or 2105.

### **B. Minimum Standard of Treatment in Accordance with International Law**

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

### **Closing Provision**

The adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement.

\* \* \* \*

### ***b. Applicability in Methanex Corporation v. United States***

In 2001 a number of pleadings were filed in *Methanex Corporation v. United States*, discussed more fully in C.2. below.

Following the release of the NAFTA Free Trade Commission interpretation of Article 1105(1), Methanex submitted a

letter dated September 18, 2001, asserting that the interpretation was immaterial to the *Methanex* case and should be disregarded in any event because, among other things, it constituted an attempt to amend rather than an interpretation of the NAFTA. Excerpts from the Response of the United States to these assertions, dated October 26, 2001, and the United States Rejoinder dated December 17, 2001, are provided below. Footnotes and internal references to other submissions have been deleted.

The full text of the Response and Rejoinder concerning the Free Trade Commission interpretation are available at [www.state.gov/s/l](http://www.state.gov/s/l) in the International Claims and Investment Disputes database.

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## **U.S. Response, October 26, 2001**

### **I. The Tribunal Must Give Effect to the FTC's Binding Interpretation of the Terms of Article 1105(1)**

\* \* \* \*

. . . The meaning of Article 1105(1) is no longer open to debate. The FTC has issued an interpretation of that Article. That interpretation is binding on this Tribunal, as the plain text of Article 1131(2) explicitly provides. . . .

### **II. The FTC Interpretation Is Not an Amendment of the NAFTA**

Methanex suggests that the Tribunal may disregard the FTC's action on the ground that it was in reality a disguised amendment of a NAFTA provision rather than an "interpretation" and, thus, ineffective and an act of bad faith. . . .

*First*, the FTC has expressly determined that its action was an interpretation of Article 1105(1). Nothing in the NAFTA grants Chapter Eleven tribunals the authority to review such determinations made by the three NAFTA Parties, acting through their respective ministers of trade, sitting as the members of the FTC.

*Second*, the FTC's binding interpretation plainly was not an amendment. As even Methanex's sources acknowledge, the long-

standing debate among academics (not among States) concerning “fair and equitable treatment” has centered on whether the phrase should be interpreted to refer to the customary international law minimum standard of treatment of aliens or to incorporate some new standard based on subjective notions of what is “fair” or “equitable.” The FTC action established as to the NAFTA that one of those interpretations was correct and the other was not. Indeed, far from a departure from conventional views as to the content of “fair and equitable treatment,” the FTC interpretation accorded with thirty years of State practice and is fully consistent with the recent holding as to Article 1105(1) by the Supreme Court of British Columbia:

In using the words ‘international law’, Article 1105 is referring to customary international law which is developed by common practices of countries. It is to be distinguished from conventional international law which is comprised in treaties entered into by countries (including provisions contained in the NAFTA other than Article 1105 and other provisions of Chapter 11).

*United Mexican States v. Metalclad Corp.*, 2001 BCSC 664 (May 2, 2001) at 23 ¶ 62. The FTC’s binding interpretation, therefore, was just that, and not an amendment. . . .

\* \* \* \*

**U.S. Rejoinder, December 17, 2001**

### **III. Article 1105(1) Prescribes the Customary International Law Minimum Standard of Treatment and No More**

There is no merit to Methanex’s contention that customary international law now encompasses the very same supposed obligations that Methanex only a few months ago asserted went “far beyond” customary international law. . . .

\* \* \* \*

. . . The international decisions Methanex cites apply the general principle of equity as an interpretive guide, not as an inde-

pendent obligation in international law. Thus, those cases do not support Methanex's contention that under customary international law States are required—in the absence of a specific rule of law—to treat investments in accordance with the concepts Methanex identifies. Moreover, those cases do not define the concept of “equity” or identify when a “measure” would violate the principle of equity under customary international law. Neither do those cases address the concepts of “fairness,” “due process,” and “appropriate protection.”

In fact, the International Court of Justice has expressly rejected a variant of Methanex's argument, holding that, in the absence of a specific obligation, the analogous general principle of “good faith” is not relevant. In *Land and Maritime Boundary* (Cameroon v. Nig.), 1998 I.C.J. 275, 296 ¶ 31 (June 11), the Court rejected the argument that Cameroon violated that principle by secretly preparing to invoke the Court's compulsory jurisdiction while maintaining contact with Nigeria on border issues. The Court explained that, “although the principle of good faith is ‘one of the basic principles governing the creation and performance of legal obligations[,] . . . it is not in itself a source of obligation where none otherwise exist.’” (quoting *Border and Transborder Armed Actions* (Nicar. v. Hond.), 1988 I.C.J. 69, 105 ¶ 94 (Dec. 20)). Indeed, Methanex's principal expert agrees that this genre of argument is ill-founded. See Jennings Letter, July 6, 2001 (“one cannot bring a case in international law merely and solely by alleging a failure of good faith.”).

. . . Methanex errs when it claims that the FTC interpretation does not preclude Article 1105 claims based on violations of other treaty obligations. Methanex has repeatedly argued that Article 1105(1)'s reference to international law encompasses conventional law, as well as customary international law. The FTC interpretation makes clear that this is not the case. FTC Interpretation ¶¶ B(1), (3). There is no longer any doubt as to the lack of foundation for Methanex's arguments that Article 1105 permits claims based on violations of WTO or other conventional international obligations.

Finally, Methanex errs in its attempt to draw an adverse inference from the FTC interpretation's silence as to the content of the minimum standard of treatment under customary international law and as to Article 1101 (contending that “[t]he only fair infer-

ence . . . is that the members of the FTC could not or would not accede to the United States' litigating positions with respect to the meaning of "relate to" in Article 1101 or the substantive content of Article 1105."). The FTC made clear that no such inferences can be drawn, cautioning that "[t]he adoption by the Free Trade Commission of this or any future interpretation shall not be construed as indicating an absence of agreement among the NAFTA Parties about other matters of interpretation of the Agreement." FTC interpretation at 2. The Tribunal, therefore, cannot infer from the FTC's silence what specific standard of customary international law the FTC would agree applies with respect to any particular aspect of the minimum standard of treatment of aliens or what interpretation should be given to the terms contained in any other Article in Chapter Eleven not addressed by the FTC.

\* \* \* \*

## **2. Claims against the United States**

### ***a. Methanex Corp. v. United States***

Methanex Corporation, a Canadian marketer and distributor of methanol, has submitted a claim to arbitration under Chapter Eleven of the NAFTA and the UNCITRAL Arbitration Rules on its own behalf and on behalf of its U.S. subsidiaries for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE. A report by the University of California in November 1998, conducted pursuant to a requirement of California state law, California Senate Bill 521, § 3(a)–(c) (1997), found that, if the use of MTBE in California were to continue at its current level, the state would face an increased danger of surface and groundwater contamination. The report also concluded that MTBE is an animal carcinogen with the potential to cause cancer in humans. On March 25, 1999, the Governor of California issued Executive Order D-5-99 requiring the California Energy Commission to develop a timetable for the removal of MTBE from gasoline in California no later than December 31, 2002.

The Executive Order also called for the California Air Resources Board to adopt regulations setting more stringent standards for California's gasoline. The regulations went into effect on September 2, 2000 and included a prohibition on the supply or sale of California gasoline produced with MTBE, effective December 31, 2002.<sup>1</sup>

Methanex contended that the Executive Order and the regulations banning MTBE expropriated parts of its investments in the United States in violation of Article 1110, denied it fair and equitable treatment and full protection and security in accordance with international law in violation of Article 1105, and denied it national treatment in violation of Article 1102. Methanex claimed damages of \$1 billion. The United States denied that the tribunal had jurisdiction over the claims and denied that any of the alleged measures violate the NAFTA.

The Tribunal established Washington, D.C. as the place of the arbitration for reasons stated in an order of December 31, 2000. On January 15, 2001, it ruled that it had the power to accept presentations by third parties as *amici*, a position that the United States supported in filings of October 27 and November 22, 2000.

In 2001, briefing was completed on jurisdiction and admissibility, and a hearing on those issues was held on July 11–13. At the end of 2001, a decision was still pending with the Tribunal.

In its Memorial of November 13, 2000, Reply Memorial of April 12, 2001, and Rejoinder Memorial of June 27, 2001, the United States argued that claims submitted by Methanex on December 3, 1999, and in an amended claim submitted on February 12, 2001, are not within the Tribunal's jurisdiction and are not admissible, as provided in the excerpts below. Excerpts are also provided from U.S. post-hearing submissions, dated July 20 and July 27, 2001, addressing two issues on which the Tribunal requested the disputing parties' views.

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<sup>1</sup> By Executive Order dated March 14, 2002, the Governor of California postponed the effective date for the ban to December 31, 2003.

Footnotes and internal references to other submissions have been omitted.

(1) *Proximate cause*

The excerpts below provide the views of the United States that the Tribunal lacks jurisdiction over Methanex's claims because the damages alleged are too remote.

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U.S. Memorial, November 13, 2000

\* \* \* \*

**I. The Tribunal Lacks Jurisdiction Over Methanex's Claims Because the Alleged Damages Are Too Remote**

Methanex has submitted its claims under the authority of Article 1116 of the NAFTA. Article 1116, however, only authorizes claims where the investor has suffered loss or damage "incurred by reason of, or arising out of," the breach of one of the listed NAFTA provisions. Here, the alleged losses of Methanex and its affiliates were not incurred by reason of, or arising out of, the alleged breaches of Chapter Eleven because they are far too removed to be considered as having been proximately caused by such alleged breaches.

\* \* \* \*

International arbitral tribunals applying the customary international law principle of proximate causation reflected in Article 1116(1) have repeatedly rejected claims more compelling than those of Methanex. International tribunals, in a variety of contexts, have found claims to be too remote when the alleged injury resulted only from the measure's effect on a third person with whom the claimant had contractual relations. Methanex, notably, does not allege that the measures in question will cause its counterparties to be unable to perform their contractual obligations. Instead, Methanex appears to contend only that measures in ques-



tion will cause its customers not to renew existing contracts or to decline to enter into new contracts with it or its affiliates. Methanex's claims necessarily are even less direct than those addressed in the following paragraphs.

International tribunals have consistently denied life insurers' claims for losses arising from the premature deaths of insureds. For example, under the Treaty of Berlin, which required compensation for losses caused *even indirectly* by Germany, the German-United States Mixed Claims Commission rejected insurers' claims for losses resulting from the premature deaths caused by Germany's sinking of the *Lusitania* in World War I: "Although the act of Germany was the immediate cause of maturing the contracts of insurance . . . this effect so produced was a circumstance incidental to, but not flowing from, such act as the normal consequence thereof, and was, therefore, in legal contemplation remote—not in time—but in natural and normal sequence." *Provident Mutual Life Ins. (U.S. v. Germ.)*, 7 R.I.A.A. 91, 112–13 (U.S.-Germ. Mixed Claims Comm'n 1924). The Commission explained: "the act of Germany in striking down an individual did not in legal contemplation proximately result in damage to all of those who had contract relations, direct or remote, with that individual, which may have been affected by his death." *Id.* at 116.

Tribunals also have routinely denied claims for injuries arising solely from the unintended, incidental effects of nondiscriminatory measures on creditors, where those measures resulted in the insolvency of debtors. For example, the Mexican-United States Claims Commission concluded:

A State does not incur international responsibility from the fact that an individual or company of the nationality of another State suffers a pecuniary injury as the corollary or result of an injury which the defendant State has inflicted upon an individual or company irrespective of nationality when the relations between the former and the latter are of a contractual nature.

*Dickson Car Wheel Co. (U.S. v. Mex.)*, 4 R.I.A.A. 669, 681 (Mex.-U.S. Gen. Claims Comm'n 1931). Creditors' claims are inadmissible under customary international law if they stem solely from

a measure's effects on the debtor: the action must directly affect the creditor's rights. *See, e.g.,* Gillian M. White, *Wealth Deprivation: Creditor and Contract Claims*, in *INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 171, 175 (Richard B. Lillich ed., 1983) (sufficient causal connection exists if the government denies the creditor's legal remedies, or the wrongdoing constitutes a "confiscation of all the debtor's property or of the debtor enterprise as a whole" and the State does not assume the debts; in that case, "the creditors have suffered a direct and immediate loss, indistinguishable from the taking of a property right."); Eduardo Jimenez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 *PHILIPPINE INT'L L.J.* 71, 73–74 (1965) ("[I]f the rights of creditors as such were directly affected, for instance, by denying them a right to sue or by refusing a mortgage owner the right to register title, then the interposition of a claim would be justified on the ground that a direct injury to an actual right, as different from an interest, has been sustained.").

Claims for indirect injuries arising from State actions that incidentally and unintentionally interfere with claimants' contractual relations with third parties are similarly denied. For example, such a claim was denied in a dispute between Canada and the United States over damages caused by transboundary pollution. *Trail Smelter* (U.S. v. Can.), 3 R.I.A.A. 1906, 1911 (first decision, 1938). Like *Methanex* here, the United States in *Trail Smelter* sought "damages in respect of business enterprises" on the ground that "business men unquestionably have suffered loss of business and impairment of the value of good will because of the reduced economic status of the residents of the damaged area." *Id.* at 1931. The tribunal rejected this claim because "damage of this nature 'due to reduced economic status' of residents in the area is too indirect, remote, and uncertain to be appraised and not such for which indemnity can be awarded." *Id.* The tribunal noted that "[n]one of the cases cited by counsel . . . sustain the proposition that indemnity can be obtained for an injury to or reduction in a man's business due to inability of his customers or clients to buy, which inability or impoverishment is caused by a nuisance. Such damage, even if proved, is too indirect and remote to become the basis, in law, for an award of indemnity." *Id.*

Also, for example, in *Fraenkel* (U.S. v. Yug.), Settlement of Claims by the Foreign Claims Settlement Commission of the

United States and its Predecessors from Sept. 14, 1949 to March 31, 1955, at 156–59 (1954) (Decision No. 356), the Commission denied a claim arising from Yugoslavia's incidental, unintended interference with the claimant's contractual relations with third parties. The claimant, a wholesale paper business with contracts for the supply of paper, was unable to obtain paper with which to continue its business after Yugoslavia nationalized its economy. The Commission characterized the claim as "one for the potential value of the business, particularly the value of its contracts, operating relationships and goodwill—essentially, a claim for future earnings," *id.* at 156, and noted that "such loss as the claimant suffered resulted, indirectly, from the general process of nationalization." *Id.* at 157. Accordingly, the Commission found that the issue was "whether, when Yugoslavia took over all paper manufacturing and distribution facilities in Yugoslavia and, by indirection frustrated the exercise by claimant of his rights in the various contracts above-mentioned, it may be said to have 'taken' those rights." *Id.* at 158. The Commission concluded that "[t]he claimant may have suffered a substantial loss as a result of action taken by the Government of Yugoslavia: but the Commission cannot find that this loss resulted from either the nationalization or other taking of his property." *Id.* at 159.

Finally, even in contexts not involving a measure's effect on contractually related parties, international arbitral tribunals deny claims where the injuries were not a sufficiently direct consequence of the subject measures. In those cases, the alleged injuries were no more remote (and the policy grounds for denying liability no more compelling) than here. For example, in *Standard Oil Co. of N.Y. (U.S. v. Germ.)*, 7 R.I.A.A. 301, 307 (Germ.-U.S. Mixed Claims Comm'n 1926), the Commission held that Germany could not be held responsible for losses to shipowners as a result of Great Britain's requisitioning their ships during wartime: "This act of Great Britain and the damages flowing therefrom are not attributable to Germany's act as a proximate cause."

\* \* \* \*

Thus, under established international law—as reflected in the holdings of numerous international arbitral tribunals in various contexts—injuries indirectly stemming from unintentionally wrongful, nondiscriminatory measures are too remote to be recov-

erable. Where, as here, all the alleged injuries solely relate to the measures' effects on third parties with whom the claimant is actually or potentially contractually tied, no international claim may lie. Methanex's claims are on their face too remote to be cognizable.

\* \* \* \*

### U.S. Reply Memorial, April 12, 2001

\* \* \* \*

Methanex's reliance on the meaning ascribed to the phrase "arising out of the use or operation" of a motor vehicle by national courts construing insurance contracts is misplaced. . . .

That the NAFTA is to be interpreted "in accordance with applicable rules of *international law*" firmly establishes that Methanex's municipal-law authorities are irrelevant to the issues before this Tribunal. A review of international authorities—which *are* relevant to the Tribunal's task—establishes that States have, over the past two centuries, used a wide variety of clauses in international agreements submitting claims to arbitration—some quite similar to Articles 1116 and 1117, some broader in their language and scope. Such clauses, however, uniformly have been interpreted to exclude claims on remoteness grounds.

The most recent and closest example is that of the Algiers Accords, which granted the Iran-United States Claims Tribunal jurisdiction over claims that "*arise out of* . . . measures affecting property rights." [citing Declaration of Algeria Concerning the Settlement of Claims (Claims Settlement Declaration), Jan. 19, 1981, U.S.-Iran, art. II(1), 20 I.L.M. 230 (1981)]. As observed in the Memorial, the Iran-United States Claims Tribunal has interpreted this provision to provide jurisdiction only over claims that meet the customary international law standard of proximate causation, and, therefore, to require dismissal of claims that are too remote. That tribunal's interpretation of a substantially similar clause in a claims agreement governed by international law provides persuasive evidence of the content of the phrase "arising out of" in Articles 1116(1) and 1117(1).

Methanex offers its view of this authority in a footnote, where it argues only that *Hoffland Honey* (the first of the decisions of

the Iran-United States Claims Tribunal construing this phrase in the Algiers Accords) addressed “unusual and bizarre circumstances” and “must be limited to its extreme facts.” . . . Neither the tribunal’s decisions subsequent to *Hoffland Honey*, including *Mohsen Asgari Nazari* and *Behring Int’l*, nor the commentators agree with Methanex’s attempt to limit the import of *Hoffland Honey*. Moreover, the relevant “fact” for the purpose of determining whether *Hoffland Honey* is relevant here is the text of the Algiers Accords, which remained the same on each of the occasions on which the tribunal confirmed that the principle of proximate causation is incorporated in the phrase “arises out of.”

The German-United States Mixed Claims Commission provides an example of an international tribunal construing even broader treaty language to similar effect. A series of treaties with Germany following World War I granted the commission jurisdiction over claims by American nationals who “‘suffered, through the acts of the Imperial German Government, or its agents, . . . loss, damage, or injury to their person or property, *directly or indirectly* . . . or in consequence of hostilities or of any operations of war *or otherwise*.’” Rejecting an argument that this treaty text contemplated a standard of causation broader than proximate causation, the German-United States Mixed Claims Commission found that proximate cause was a necessary element to bring any claim within the jurisdiction established under the treaty, notwithstanding the text’s express reference to indirect losses:

The simple test to be applied in all cases is: has an American national proven a loss suffered by him, susceptible of being measured with reasonable exactness by pecuniary standards, and is that loss attributable to Germany’s act as a proximate cause?

. . . [T]he contention of American counsel . . . must be rejected. The argument, pressed to its logical conclusion, would fix liability on Germany . . . for *all* costs or consequences of the war, direct or remote, to the extent that such costs were paid or losses suffered by American nationals. . . . The mere statement of the extreme lengths to which the interpretation we are asked to adopt carries us demonstrates its unsoundness.

. . .

The Mexico-United States Claims Convention of 1923 provides another example of a compromissory clause containing language similar to the phrase “arising out of” in Articles 1116(1) and 1117(1): it provided, among other things, for arbitration of “all claims for losses or damages *originating from* acts of officials or others acting for either Government and resulting in injustice. . . .” The Mexican-United States General Claims Commission did not construe the phrase “originating from” as relaxing the traditional standard of proximate causation; instead, it held that “only those damages can be considered as losses or damages caused by [the official] which are immediate and direct results of his [action].” [citing *H.G. Venable*, 4 R.I.A.A. 219, 225 (Mex.-U.S. Cl. Comm’n 1927)] Other international tribunals applying international law have similarly construed a wide variety of different treaty language to be consistent with the customary international law principle that remote claims—*i.e.*, claims where proximate cause is lacking—may not proceed.

These international tribunals reached the same result in construing differing language for the reasons outlined in the United States’ Memorial: unless a different intent unmistakably appears from the text, for a claim to be submitted to international arbitration, the ordinary standard—that of proximate cause—for the relationship between an alleged breach and an alleged loss applies. As Umpire Ralston stated in the *Sambiaggio* case, if the governments intended to depart from the general principles of international law, then the “agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.” [citing 10 R.I.A.A. 499, 521] Like the provisions of each of the international claims agreements reviewed above, Articles 1116(1) and 1117(1) contain no indication that the NAFTA Parties intended to vary from centuries of claims practice and dramatically expand the number and range of claims for which they would be liable.

\* \* \* \*

#### U.S. Rejoinder Memorial, June 27, 2001

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. . . Methanex “has pointed this . . . [Tribunal] to no case, and it is safe to assert that none can be found, where any tribunal has

awarded damages to one party to a contract claiming a loss as a result of . . . [an action affecting] the second party to such contract by a third party not privy to the contract without any *intention* of disturbing or destroying such contractual relations.” 7 R.I.A.A. 266, 268–69 (Germ.-U.S. Mixed Claims Comm’n 1926)(emphasis in original). Instead, Methanex contends that its claims should proceed merely because an indirect impact of the California measures on prospective contractual relations between MTBE producers and methanol producers might have been reasonably foreseen.

Reasonable foreseeability alone, however, is not the test of proximate cause applied by international tribunals: for proximate cause, reasonable foreseeability may be a necessary element, but it is not sufficient in and of itself. In addition to the numerous international authorities cited in the Memorial, the municipal laws of common law countries illustrate this principle in contexts analogous to those alleged here. Under such municipal laws, a claimant can recover for remote and purely economic losses such as those at issue here—even if those losses were reasonably foreseeable—only if the respondent intended specifically to injure that particular claimant. Alleged intent by the respondent to injure a third party with whom the claimant is contractually related, however, is not enough to overcome remoteness. For example, international tribunals have held that insurers could not recover against a State that killed insureds unless the State’s actions were intended to disturb the contractual relations between the insurers and their insureds.

\* \* \* \*

## (2) *Identification of right violated*

The excerpts below provide the views of the United States that Methanex failed to identify any right violated by the measures at issue.

U.S. Memorial, November 13, 2000

\* \* \* \*

## II. Methanex Fails to Identify Any Right Violated by the Measures at Issue

It is a well-established principle of customary international law that to maintain a claim a *right* owed to the claimant must be violated—whether “the interests of the aggrieved are affected” is not relevant. *Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 35 ¶ 44 (Feb. 5); *see also* Eduardo Jimenez de Aréchaga, *Diplomatic Protection of Shareholders in International Law*, 4 PHIL. INT’L L.J. 71, 74 (1964) (“the indispensable legal basis of any valid international claim is the injury to a right and not the mere prejudice to an interest which has not yet crystallized into an actual right and which is not legally protected by a remedy under municipal law. Such a basic distinction between rights and interests has been recognized and proclaimed in *dicta* of the Permanent Court and of the present International Court.”).

\* \* \* \*

### A. Methanex Fails To Identify An Investment That Would Give This Tribunal Jurisdiction To Entertain A Claim Under Article 1110

This Tribunal lacks jurisdiction to hear Methanex’s claim that the United States has violated Article 1110 of the NAFTA because Methanex has failed to identify an investment to which the obligations of Article 1110 attach. Article 1110 of the NAFTA provides restrictions on a State Party’s ability to expropriate the *investments* of investors of another State Party. Article 1139 of the NAFTA identifies an exhaustive list of property rights and interests that may constitute an “investment” for purposes of Chapter Eleven. None of the property rights or property interests identified in the definition of “investment” in Article 1139, however, encompass a mere hope that profits may result from prospective sales to a particular segment of a market, which at bottom is what Methanex alleges in this case has been expropriated.

#### 1. A customer base is not an investment capable of being expropriated

\* \* \* \*



Subparagraph (g) of Article 1139 provides that “investment” means “real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes.” Subparagraph (h) of Article 1139 provides that “investment” means interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under (i) contracts involving the presence of an investor’s property in the territory of the Party, including turnkey or construction contracts, or concessions, or (ii) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise.

To determine whether something falls within either subparagraph (g) or (h), one must first determine whether the thing sought to be protected constitutes “property” or an “interest,” respectively, for which protection from expropriation is granted. Chapter Eleven does not define “property” or “interest.” The ordinary meaning of each of these terms, however, viewed in the context of an investment protection regime like Chapter Eleven and in light of the NAFTA’s object and purpose, plainly is *property* rights and interests. “Customers,” clearly, do not constitute “property rights” or “property interests.” Customers cannot be bought or sold, pledged, mortgaged, traded or otherwise disposed of in the same manner as rights under contracts, claims for money, stocks, bonds or any of the property interests in which one can invest. Thus, a customer base does not fall within the definition of “investment” according to that definition’s plain meaning. Moreover, extending Chapter Eleven’s protection of investments to a non-property interest that cannot be bought or sold does nothing to further the NAFTA’s objective of “increas[ing] substantially investment opportunities in the territories of the Parties.” NAFTA art. 102(1)(c).

. . . Article 31(3)(c) of the Vienna Convention requires the Tribunal to “take[] into account . . . any relevant rules of international law applicable in the relations between the parties.” It is a principle of customary international law that in order for there to have been an expropriation, a *property* right or interest must have been taken. See, e.g., Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 R.C.A.D.I. 259, 272 (1982) (“[O]nly *property* deprivation will give rise to compensation.”) (emphasis in original); Rudolf

Dolzer, *Indirect Expropriation of Alien Property*, 1 ICSID REVIEW, FOR. INVESTMENT L.J. 41, 41 (1986) (“Once it is established in an expropriation case that the object in question amounts to ‘property,’ the second logical step concerns the identification of expropriation.”). Because a customer base is not, by itself, a property right or interest capable of being expropriated, Methanex has failed to identify any investment that could give rise to a claim under NAFTA Article 1110.

International courts have rejected claims that a customer base, or goodwill, by themselves, are property that can be the subject of an expropriation. For instance, in the *Oscar Chinn* case before the Permanent Court of International Justice, the Court denied an expropriation claim for failure to identify a property right. (U.K. v. Belg.), 1934 P.C.I.J. (ser. A/B) No. 63, at 88 (Dec. 12). In that case, a British river carrier operator claimed that the Belgian Congo had expropriated its property when it increased government funding for a state-owned competitor which resulted in that competitor being granted a *de facto* monopoly. In denying the claim, the Court held that it was “unable to see in [claimant’s] original position—which was characterized by the possession of customers . . . anything in the nature of a genuine vested right.” *Id.* The Court reasoned that “[f]avourable business conditions and goodwill are transient circumstances, subject to inevitable changes.” *Id.*; see also Rudolf L. Bindschedler, *La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 223–24 (1956) . . . (“Clientele, a notion intimately linked to that of liberty of commerce and industry, is no more capable of expropriation than the latter.”) (emphasis omitted; translation by counsel). Because customers and goodwill are not, by themselves, property rights capable of being expropriated, they similarly cannot constitute property rights or interests under subparagraphs (g) or (h) of Article 1139.

Finally, this conclusion is confirmed by the interpretive rules of *noscitur a sociis*—“a word is known by the company it keeps”—and *ejusdem generis*—general words are limited by the meaning indicated by accompanying specific words. See, e.g., *Northern Cameroons*, (Cameroon v. U.K.) 1963 I.C.J. 15, 91 (Dec. 2) (sep. op. Spender, J.); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995); PIERRE-ANDRÉ CÔTÉ, *THE INTERPRETATION OF LEGISLATION IN CANADA* 241–49 (1984). Courts regularly use these principles

“to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving ‘unintended breadth’ to the language. *Gustafson*, 513 U.S. at 575 (citation omitted).

The examples provided in subparagraph (h) of “interests” that arise from the commitment of capital or other resources to economic activity are property interests under various types of contracts and concessions. By contrast, a customer is not an interest acquired under a contract, but rather someone *with whom* one contracts. Given the conceptual difference between the types of property interests listed as examples to subparagraph (h) and Methanex’s claims here, it would be unreasonable to ascribe so broad a meaning to subparagraph (h) as Methanex suggests.

**2. *Maintenance of a certain rate of profit is not an investment capable of giving rise to an expropriation claim***

Methanex’s claim, in essence, boils down to an expectation that it would make a certain rate of profit on methanol sales to a specific market segment and that the California actions have adversely affected that expectation. Such an expectation cannot form the basis for an expropriation claim, however. “Expectations” are not property rights that may be expropriated. The definition in Article 1139 was intended to reflect and, in some cases, limit the customary international law notion of “property” that could be the subject of expropriation. That definition, however, does not list a mere expectation of future profits as an “investment” protected under Chapter Eleven. Nor does customary international law recognize maintenance of a certain rate of profit as property or a property right that can be expropriated.

Thus, an international tribunal denied a claim for expropriation where the claimant alleged that the imposition of an allegedly burdensome series of license fees had rendered its business unprofitable. See *Kügele v. Polish State* (Germ. v. Pol.), reprinted in ANN. DIG. 1931/1932, at 69 (Upper Silesian Arbitral Trib. 1932). There, the tribunal noted that:

there is an essential difference between the maintenance of a certain rate of profit in an undertaking and the legal

and factual possibility of continuing the undertaking. The trader may feel compelled to close his business because of the new tax. . . . But this does not mean that he has lost the right to engage in the trade.

Similarly, in rejecting a claim for expropriation where the applicant contended that European Community regulations resulting in the oversupply of low-priced, dry skim milk products used for animal feed had the effect of decreasing demand for its competing product and would cause its business to close down, the European Court of Justice held that:

[t]he measures adopted by the Commission do not deprive the applicant of its property or the freedom to use it and therefore do not encroach on the substance of those rights. Even though those measures may . . . have a detrimental effect on sales of its products, that negative effect cannot be regarded as an infringement of the substance of those rights, particularly where . . . the detrimental effect is merely an indirect consequence of a policy with which aims of general public interest are pursued. . . .

Case 59/83, *SA Biovilac NV v. European Economic Comm'ty*, [1984] E.C.R. 4057, at IV(A)(3) (1984); *see also* GILLIAN WHITE, NATIONALISATION OF FOREIGN PROPERTY 49 (1961) ("A property right, in order to qualify for the protection of the international law rules must be an actual legal right, as distinct from a mere economic or other benefit, such as a situation created by the law of a State in favour of some person or persons who are therefore interested in its continuance."). Because Methanex claims no more than lost future profits without identifying any property right that has been expropriated, this Tribunal lacks jurisdiction over Methanex's Article 1110 claim.

#### **B. Methanex's Article 1105(1) Claim Is Inadmissible On Its Face**

2. *No customary international law standard incorporated into Article 1105(1) applies to the acts at issue here*

The “international minimum standard” is an umbrella concept incorporating a set of rules that have over the centuries crystallized into customary international law in specific contexts. The American Law Institute’s *Restatement* frames the standard in the following terms:

The international standard of justice . . . is the standard required for the treatment of aliens by

(a) the applicable principles of international law as established by international custom, judicial and arbitral decisions, and other recognized sources or, in the absence of such applicable principles,

(b) analogous principles of justice generally recognized by states that have reasonably developed legal systems.

The relevant principles are generally grouped under the heading of State responsibility for injuries to aliens. This body of law includes standards for denial of justice, expropriation and other acts subject to an absolute, rather than a relative, standard of international law.

No international standard incorporated into Article 1105(1), however, is implicated by the measures at issue here. Methanex asserts essentially two complaints concerning the Bill and the Executive Order. First, it complains about the *process* by which the measures were adopted. It asserts that the Executive Order was “based on a process which lacked substantive fairness”; “was based solely on the UC Report” and that the report in turn lacked “a proper risk characterization”; relied on “an extraordinarily scant database . . . and broad assumptions”; “contained a badly flawed exposure assessment and cost/benefit analysis”; and failed adequately to “discuss alternative solutions and remediation.” Second, Methanex complains about the *substance* of the measures, asserting that the measures were “arbitrary” and “go[] far beyond what is necessary to protect any legitimate public interest.”

However, as confirmed in the accompanying Expert Report of Detlev F. Vagts, Bemis Professor of Law at Harvard Law School and reporter for the *Restatement (Third) of Foreign Relations*

*Law of the United States*, customary international law imposes no constraints on the *processes* by which States adopt executive or legislative measures such as these. As Professor Vagts recognizes, there is “no rule of customary international law that imposes constraints on the process by which States exercise their jurisdiction to prescribe. The variety of legislative and administrative procedures for laying down rules is so great—involving federal States and centralized States, parliamentary States and presidential States, democratic States and authoritarian States—that no general international consensus on what is a fair process has emerged or even been proposed.” Vagts Rep. ¶ 15. Methanex’s assertions directed to the process by which the challenged measures were issued are misplaced.

Nor can Methanex identify any *substantive* obligation of “treatment in accordance with international law” implicated by the measures at issue here. The principal substantive standard applicable to legislative and rule-making acts in the investment context is the rule barring expropriation without compensation recognized in Article 1110. For the reasons already expressed, however, Methanex can identify no “investment” on which an expropriation claim could be founded on these allegations. There is no other substantive international standard applicable to this case under Article 1105(1). Methanex has identified none.

At bottom, Methanex’s claim is founded on a disagreement with the policy judgments that underlay the California Governor’s decision to task state agencies with taking action toward a ban of MTBE in the state’s gasoline. No standard of customary international law, however, guarantees a right to measures that an alien agrees with. Methanex’s Article 1105(1) claim is inadmissible.

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## U.S. Reply Memorial, April 12, 2001

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### A. Methanex’s Proposed Article 1102 Claim Is Inadmissible On Its Face

Methanex’s new national-treatment claim fails on its face. The sole basis for Methanex’s claim is that California has enacted a

future ban on MTBE in gasoline, but has not banned the use of ethanol in gasoline. Methanex, however, does not allege that it or its investments were treated differently from any producer or marketer of methanol that is an “investor of the United States” or an “investment of an investor of the United States.” . . .

\* \* \* \*

. . . Article 1102 does not obligate NAFTA Parties to treat all *products* equally; instead, it requires treatment that is not less favorable with respect to *investors* of other NAFTA Parties and their investments that are in like circumstances with their U.S. counterparts. Methanex does not allege that it or its investments are in like circumstances with producers and marketers of ethanol. It could not credibly do so. Ethanol and methanol are different products with different properties and uses, produced by industries in different sectors of the economy. Most important with respect to the measures at issue, methanol is not used as an oxygenate in gasoline, while ethanol is. Participants in the methanol and ethanol industries can hardly be viewed as in like circumstances when their products do not compete for the only relevant market—that for oxygenate gasoline additives.

The only authority on which Methanex relies—the NAFTA Chapter Eleven award in *S.D. Myers v. Canada*, (Nov. 13, 2000) (Partial Award)—in no way advances its cause. *S.D. Myers* alleged that Canada accorded more favorable treatment to two Canadian companies than it did to *S.D. Myers*. In that case, however, the Canadian companies and *S.D. Myers* were all engaged in the same business: all three companies provided PCB waste disposal services. As shown above, Methanex and its affiliates, on the one hand, and ADM and other investors and their investments that produce, market and sell ethanol, on the other, are not in like circumstances with one another. The *S.D. Myers* tribunal’s finding that *S.D. Myers* was “in like circumstances” with the Canadian companies does not support Methanex’s argument here.

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## B. Methanex’s Article 1105(1) Claim is Inadmissible on its Face

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The United States recognizes that international law can impose obligations of good faith and reasonableness in certain specific circumstances. For example, customary international law holds that “[e]very treaty in force is binding on the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties, May 22, 1969, art. 26, 1155 U.N.T.S. 331. Also, in some circumstances, States have entered into treaties that impose a reasonableness requirement with respect to specific activities. As confirmed by the annexed reply report of Harvard Law School Professor Detlev Vagts, however, there is no *general* international principle that requires all of a State’s legislative or administrative rules to conform to any customary international standard of “good faith” or “reasonableness.” . . .

Methanex cites several categories of authorities, none of which support a general obligation of reasonableness or good faith that would apply to the measures at issue here. The first category consists of decisions that merely noted and applied the principle of *pacta sunt servanda* stated above (that treaty obligations must be performed in good faith), or involved treaty provisions that imposed an obligation of reasonableness on specified State activities. Of course, here, neither the Executive Order nor the CaRFG3 Regulations were issued to implement treaty obligations, and nothing in the NAFTA imposes an obligation of reasonableness with respect to those measures. Thus, this category of authorities does not support a customary international law obligation of reasonableness or good faith applicable here.

The second category merely recognizes that, under customary international law, States *may* discriminate against aliens as long as that discrimination is not unreasonable (*e.g.*, granting only citizens the right to vote). These authorities are inapposite here. First, as noted above, Methanex has failed credibly to allege that the subject California measures violate the prohibition of discrimination against aliens agreed to by the NAFTA Parties in the form of Article 1102. Second, . . . no general customary international law prohibition of nationality-based discrimination is incorporated into Article 1105(1), and, therefore, customary international law principles addressing the reasonableness of discriminating against aliens in specific circumstances are irrelevant with respect to Methanex’s Article 1105(1) claim.



The third category consists of the NAFTA Chapter Eleven awards in *Metalclad* and *S.D. Myers*. [A]ll three NAFTA State Parties agree that the portion of the *Metalclad* award dealing with the fair and equitable treatment obligation was wrongly reasoned. And the statement from *S.D. Myers* cited by Methanex is vague *dicta* unsupported by any citation to authority. Thus, *S.D. Myers* is not persuasive here.

Finally, Methanex relies on Sir Gerald Fitzmaurice's discussion of the controversial doctrine of abuse of rights in international law. Methanex fails to disclose, however, Judge Fitzmaurice's caution that the doctrine "has not been affirmed by the [ICJ]" and "cannot be regarded as definitely established, or as constituting an accepted principle of international law."

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## U.S. Rejoinder Memorial, June 27, 2001

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### A. Methanex's 1102 claim Is Inadmissible

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Evaluating compliance with Article 1102 requires a two-step analysis. The first step is to identify domestic investors or domestically-owned investments that are in like circumstances with the foreign investor or foreign-owned investment. The second step, having now identified the domestic group that is in like circumstances with the foreign investor or investment, is to determine whether the foreign investor or its investment has been accorded different treatment, on the basis of its nationality, in comparison to that domestic group with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

\* \* \* \*

Methanex cites Professor Jackson for the supposed proposition that apples and oranges can be "like products" for national treatment purposes. Apart from the fact that Professor Jackson was not discussing NAFTA Article 1102 but rather a specific pro-

vision in GATT Article III:2, Methanex fundamentally misunderstands Professor Jackson's point.

GATT Article III:2 consists of two sentences, each of which imposes a separate discipline. The first sentence prohibits a WTO Member from subjecting another WTO Member's products to internal taxes or other internal charges in excess of those applied to "like" domestic products. The second sentence of GATT Article III:2 addresses a separate trade policy problem, and does so in terms based not on "like" products, but on the separate concept of "directly competitive" products. As Professor Jackson acknowledges in the sentence following the passage quoted by Methanex: "[A] broader relationship than that of 'like products' is contemplated by competitive products. . . ." This GATT concept has no analogue whatsoever in the language of Article 1102 and is therefore inapposite. Indeed, not only does Article 1102 apply to investment and not to goods, it expressly provides that the standard to be applied is "in like circumstances."

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#### **B. Methanex's Article 1105(1) Claim is Patently Without Merit**

Nor is there merit to Methanex's suggestion that "fair and equitable treatment" in the subjective sense has passed into customary international law. As Professor Vagts observes:

It is of course true that international agreements "may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted." *Restatement (Third) of Foreign Relations Law of the United States* § 102(3) (1987). Bilateral investment treaties are not "intended for adherence by states generally," however. The one recent effort at a multilateral agreement that was intended for general adherence—the proposed Multilateral Agreement on Investment prepared under the auspices of the Organisation on Economic Co-operation and Development—was abandoned without ever being opened for signature. The predicate for the formation of customary international law based on conventional investment obligations does not appear to be present here.

Vagts Rejoinder Report ¶ 15. Moreover, Methanex's argument erroneously presumes that "fair and equitable treatment" as used in the bilateral treaties it references has a content different from that of the international minimum standard of treatment at customary international law. Methanex cites no instance of State practice to support its presumption. As the United States has demonstrated, the evidence of State practice on this point consistently considers "fair and equitable treatment" to be based on long-standing principles of customary international law.

\* \* \* \*

In its Rejoinder, Methanex alleges for the first time that the subject measures violate principles of "transparency," which it does not define but nonetheless asserts "are fundamental principles of international law." Methanex's new assertion is without merit.

*First*, although Methanex is correct that NAFTA Chapter Eighteen imposes certain treaty-based obligations of transparency and that GATT Article X has been interpreted to impose certain minimum standards of treatment, neither NAFTA Chapter Eighteen nor GATT Article X may serve as the basis for an investor-State arbitration under Chapter Eleven—because neither is included in the list of actionable obligations in Articles 1116(1) and 1117(1). There is no longer any room for doubt on this point: all three NAFTA Parties have in formal pleadings agreed that any principles of transparency and procedural fairness, including those embodied in NAFTA Chapter Eighteen and GATT Article X, that are not part of customary international law are not incorporated into Article 1105(1). As the Supreme Court of British Columbia explained in holding that the *Metalclad* tribunal, by making "its decision on the basis of transparency," went "beyond the scope of the submission to arbitration because there are no transparency obligations contained in Chapter 11":

In addition to specifically quoting from Article 1802 in the section of the Award outlining the applicable law, the Tribunal incorrectly stated that transparency was one of the objectives of the NAFTA. In that regard, the Tribunal was referring to Article 102(1), which sets out the objectives of the NAFTA in clauses (a) through (f). Transparency

is mentioned in Article 102(1) but it is listed as one of the principles and rules contained in the NAFTA through which the objectives are elaborated. The other two principles and rules mentioned in Article 102, national treatment and most-favored nation treatment, are contained in Chapter 11. The principle of transparency is implemented through the provisions of Chapter 18, not Chapter 11. Article 102(2) provides that the NAFTA is to be interpreted and applied in light of the objectives set out in Article 102(1), but it does not require that all of the provisions of the NAFTA are to be interpreted in light of the principles and rules mentioned in Article 102(1).

*United Mexican States v. Metalclad Corp.*, Supreme Court of British Columbia, 2001 BCSC 664 (May 2, 2001) at 27 ¶ 71.

*Second*, there is no general requirement of “transparency” in customary international law. As demonstrated in the Memorial and confirmed by Professor Vagts, customary international law imposes no constraints on the process by which executive and legislative measures of general applicability, such as the subject measures, are adopted. *Id.* at 45; Vagts Rep. ¶ 15. Methanex in its Rejoinder offers no persuasive authority to the contrary.

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. . . [Methanex] asserts—based only on the number of WTO Member States—that a “least-restrictive measure principle” supposedly reflected in WTO agreements has become part of customary international law.

In *North Sea Continental Shelf (F.R.G. v. Den; F.R.G. v. Neth.)*, the International Court of Justice held that, in order for a provision to become part of customary international law, it must be “a norm-creating provision,” one which “is now accepted as [a norm of the general corpus of international law] by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention.” 1969 I.C.J. 3, 41 ¶ 71 (Feb. 20). The Court cautioned that, although this process “does from time to time occur,” the incorporation of a treaty provision into customary international law “is not lightly to be regarded as having been attained.” *Id.* The Court further

noted that there are “other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law.” *Id.* at 42 ¶ 73. As demonstrated below, none of these elements support Methanex’s claim that a “least-restrictive measure principle” is now part of customary international law.

*First*, the treaty provisions on which Methanex relies are not “norm-creating provision[s]” in the sense indicated by the *North Sea* Court. Methanex never explains what this “least restrictive measure principle” is which it claims has become a part of customary international law. Methanex relies on GATT Article XX and the WTO Agreements on the Application of Sanitary and Phytosanitary Measures (“SPS Agreement”) and Technical Barriers to Trade (“TBT Agreement”) as sources for this principle, but there is no common “least restrictive measure” concept embodied in all three texts. Methanex offers no international tribunal decisions or other authorities that have found the so-called principle to be a part of customary international law.

Nor is there any shared understanding within the WTO membership that some type of less or least restrictive principle is to be read into these agreements. Such a principle, therefore, cannot possibly be said to have become a principle of customary international law.

*Second*, Methanex has made no showing whatsoever of “State practice, including that of States whose interests are specifically affected,” that has been “extensive and virtually uniform in the sense of the provision invoked” and has “occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.” 1969 I.C.J. at 43 ¶ 74. As the *North Sea* Court noted, the only State practice relevant in such an inquiry is that of States that are *not* parties to the convention at issue—for only the practice of such States can clearly evidence a belief that the principle at issue is binding as a rule of *customary*, rather than conventional, international law. *See id.* at 43 ¶ 76. Methanex points to not a single instance of any practice by a State that is not a Member of the WTO, much less an instance evidencing a belief that the supposed “least-restrictive measure principle” is binding on such a State.

*Third*, although Methanex is correct that over one hundred States are WTO Members, that by itself does not fulfil the *North*

Sea Court's requirement of "a very widespread and representative participation in the convention . . . *provided it included that of States whose interests were specifically affected.*" *Id.* at 42 ¶¶ 72–73 (emphasis supplied). Among others, neither Russia, China nor Saudi Arabia are WTO Members. Thus, the WTO's membership cannot be viewed as functionally universal.

*Fourth*, a "considerable period of time" has not passed since the WTO agreements came into force six years ago. In the *North Sea* case, the ICJ expressly found that five years since a treaty was signed was not a "considerable amount of time." *See North Sea*, 1969 I.C.J. at 42–43 ¶¶ 73–74.

*Finally*, provisions in trade agreements such as those Methanex invokes here are not generally in the nature of "norm-creating provisions" intended to articulate a rule of customary international law binding on States not party to the agreement. Obligations in trade agreements are typically assumed by States in exchange for a complex package of trade-related benefits—as part of the overall balance of concessions that the trade agreement achieves. States that enter into trade agreements generally would not agree to any specific obligation except as part of a broader balance of obligations and benefits. Agreements such as these, therefore, do not generally provide the kind of "norm-creating provision" suitable for transformation into a rule of customary international law.

Moreover, even assuming, *arguendo*, that a "least restrictive measure principle" has become part of customary international law with respect to matters relating to trade—which it has not—this would not evidence that such a principle has become part of customary international law with respect to matters relating to the treatment of foreign-owned investments. No treaty or international tribunal decision recognizes a "least restrictive measure principle" in the investment context.

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### (3) *Cognizable loss or damage*

The excerpts below provide the views of the United States that Methanex has not incurred cognizable loss or damage under Article 1116.

U.S. Memorial, November 13, 2000

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A finding that this Tribunal lacks jurisdiction comports not only with the language of the NAFTA itself, but with the practice of international courts and tribunals which have declined to exercise jurisdiction or have dismissed claims where, as here, the challenged measure was not self-executing and, therefore, could not be deemed to have inflicted a cognizable injury upon the claimant.

The Iran-United States Claims Tribunal, for instance, applied this principle of customary international law in *Malek v. Iran*, Award No. 534-193-3, at ¶ 54 (U.S.-Iran Cl. Trib. 1992). In that case, an investor claimed that his property had been expropriated by virtue of the passage of an Iranian law that provided for seizure and sale of property under the supervision of a local prosecutor if an Iranian citizen acquired another nationality in violation of Iranian law. On November 5, 1980, the claimant became a naturalized United States citizen. His property was seized by Iran on February 28, 1981. The Algiers Accords that established the tribunal provided for jurisdiction to adjudicate claims for expropriation and interference with property rights that arose before January 19, 1981, the date of the Accords. The claimant contended that the effective date of the expropriation should be deemed to be November 5, 1980, the date that he became a citizen and his property thus became subject to seizure pursuant to Iranian law.

The tribunal dismissed the claimant's expropriation claim for lack of jurisdiction. It held that the Iranian law did not "trigger[] an automatic expropriation of his alleged landed properties as soon as he became an American citizen." The tribunal found that the law in question was not self-executing because, in order to consummate the sale of any property pursuant to the law, a procedure for the sale of the property had to be set in motion under the supervision of the local public prosecutor and a magistrate needed to issue an order to that effect. The claimant failed to demonstrate that any such order concerning his property had been issued between November 5, 1980 and January 19, 1981.

Consequently, the tribunal held that the claim was outside the scope of its jurisdiction.

A similar result was reached in *International Technical Prods. Corp. v. Iran*, 9 Iran-U.S. Cl. Trib. Rep. 206 (1985) (Award No. 196-302-3). The claimant in that case challenged the issuance of an executive writ on September 2, 1980, notice of which was served on the claimant on November 9, 1981. The writ, in essence, constituted a demand for payment of a mortgage loan and threatened foreclosure in the absence of payment. According to Iranian law, a debtor has eight months from service of the writ to pay the debt and thereby retain title to the property. Alternatively, within six months of that same date (in this case, May 1982), the owner of the property has the right to request that the property be sold at auction with any surplus being returned to the debtor. On September 17, 1983, an Iranian bank foreclosed on claimant's property. The tribunal held that the claimant had not irreversibly lost possession and control of its property until May 1982—well after January 19, 1981—and it therefore lacked jurisdiction to hear the claim.

Other claims tribunals have similarly held that a claim for expropriation only becomes ripe when the alleged act of expropriation actually occurs. For example, in declining to exercise jurisdiction over a claim, the American and Panamanian General Claims Arbitration noted that:

ordinarily, and in this case, a claim for the expropriation of property must be held to have arisen when the possession of the owner is interfered with and not when legislation is passed which makes the later deprivation of possession possible. . . . Practical common sense indicates that the mere passage of an act under which private property may later be expropriated without compensation by judicial or executive action should not at once create an international claim on behalf of every alien property holder in the country . . . claims should arise only when actual confiscation follows.



*Mariposa* (U.S. v. Pan.), American and Panamanian General Claims Arbitration 577 (1933); *see also Electricity Co. of Sofia & Bulgaria* (Belg. v. Bulg.), 1939 P.C.I.J. (ser. A/B) No. 77 (Apr. 4) (dismissing portion of claim challenging Bulgarian tax law as discriminatory because the Government of Belgium, the claimant, had not demonstrated that a dispute relating to such law had arisen between the two governments as of the date that the claim was filed); *Pobrica* (Int'l Cl. Settlement Comm'n. 1953) (Amended Final Decision, on file with the U.S. Dep't of State) ("[T]he mere enactment of a law under which property may later be nationalized does not create a claim. . . . [A] claim for nationalization or other taking of property does not arise until the possession of the owner is interfered with."); *cf. Bindschedler, La protection de la propriété privée en droit international public*, 90 R.C.A.D.I. 179, 213 (1956) . . . ("At most one can consider that a legislative act that is not self-executing, *i.e.*, which depends for its implementation on an act of the executive, does not create by itself any international responsibility.") (translation by counsel); Eduardo Jiménez de Aréchaga, *International Responsibility*, in *MANUAL OF PUBLIC INTERNATIONAL LAW* 531, 546 (Max Sørensen ed., 1968).

Chapter Eleven of the NAFTA also recognizes the distinction between an action that indicates an intention to expropriate and an action that constitutes an expropriation. *See* NAFTA art. 1110(2) ("Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ('date of expropriation'), and shall not reflect any change in value occurring because the intended expropriation had become known earlier."). This language is consistent with the rule that an expropriation ripens when an expropriation takes place, and not when events evidencing a future intent to expropriate an investment occur.

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#### (4) *Claims for injuries to an enterprise*

The excerpts below provide the views of the United States that Article 1116 grants no jurisdiction over claims for injuries allegedly suffered by an enterprise.

U.S. Memorial, November 13, 2000

**V. Article 1116 Grants No Jurisdiction Over Claims For Injuries Allegedly Suffered By An Enterprise**

Methanex's Notice of Arbitration and Statement of Claim identify Article 1116 of the NAFTA as the sole jurisdictional basis for its claims. Methanex's claims, however, are not claims of independent injury, but are, rather, merely derivative of injuries allegedly suffered by the enterprises that constitute its U.S. investments. Article 1116 provides no jurisdiction over Methanex's claim.

The NAFTA provides two separate jurisdictional bases for investors to bring claims against a NAFTA Party: Articles 1116 and 1117, each of which serves a distinct function. Article 1116 provides for claims for loss or damage incurred by an investor. Article 1117, on the other hand, addresses claims for loss or damage to an enterprise owned or controlled by an investor. *See North American Free Trade Agreement, Implementation Act, Statement of Administrative Action, H.R. Doc. No. 103-159, Vol. I (1993) at 145* ("Articles 1116 and 1117 set forth the kinds of claims that may be submitted to arbitration: respectively, allegations of direct injury to an investor, and allegations of indirect injury to an investor caused by injury to a firm in the host country that is owned or controlled by an investor."). Because Methanex cannot claim any loss independent of that allegedly suffered by Methanex US and Methanex Fortier, it has no standing to bring a claim under Article 1116.

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That Methanex lacks standing to assert its claims under Article 1116 comports with rules of customary international law. It is well established in customary international law that corporations have a legal existence separate from that of their shareholders. *See Barcelona Traction*, 1970 I.C.J. 3, 34 ¶ 41. In *Barcelona Traction*, the International Court of Justice held that Belgium had no standing to bring a claim against Spain for the alleged expropriation of assets of a Canadian limited liability company, the shareholders of which were overwhelmingly Belgian. The Court held that the Belgian shareholders had no right to take action on

behalf of the corporation; if the corporation was injured, the corporation alone could act. Because the place of incorporation of Barcelona Traction Light & Power Co., Ltd. was Canada, the corporate entity was deemed to be Canadian: Canada alone had the right to espouse the claim. Central to the Court's analysis was the observation that:

[n]otwithstanding the separate corporate personality, a wrong done to the company frequently causes prejudice to its shareholders. But the mere fact that damage is sustained by both company and shareholder does not imply that both are entitled to claim compensation. Thus no legal conclusion can be drawn from the fact that the same event caused damage simultaneously affecting several natural or juristic persons.

*Id.* at 35 ¶ 44. *See also* Aréchaga, *Diplomatic Protection of Shareholders in International Law*, at 75 (“[I]f the acts complained of are directly aimed at the corporation as such and not directed against the shareholders’ own rights . . . then it is only the corporation as such which will be called upon to act in municipal law and the State of nationality of the corporation [is] the only one which may take up its case in the international plane.”); *Frenkel* (U.S. v. Aus.), Tripartite Claims Commission: Final Report of the Commissioner 111 (U.S.-Aus.-Hung. 1929); *Deutsche Amerikanische Petroleum Gesellschaft Oil Tankers* (U.S. v. Reparation Comm’n), 2 R.I.A.A. 778, 793 (1926) (“[O]nly the extent and not the nature or the essence of his rights can vary with the number of shares that a shareholder may possess . . . these rights must be identical, whether the company’s shares are distributed among many holders or are owned by a single owner.”).

The Court in *Barcelona Traction* also recognized, however, that there may be instances where a shareholder suffers a direct injury, in which case the shareholder (or, in cases before the Court, where individual shareholders do not have standing, the State of which that shareholder is a citizen) would have standing to bring a claim:

The situation is different if the act complained of is aimed at the direct rights of the shareholder as such. It is well

known that there are rights which municipal law confers upon the latter distinct from those of the company, including the right to any declared dividend, the right to attend and vote at general meetings, the right to share in the residual assets of the company on liquidation. Whenever one of his direct rights is infringed, the shareholder has an independent right of action. On this there is no disagreement between the Parties. But a distinction must be drawn between a direct infringement of the shareholder's rights, and difficulties or financial losses to which he may be exposed as the result of the situation of the company.

*Barcelona Traction*, 1970 I.C.J. at 36 ¶ 47; *see also* Aréchaga, *Diplomatic Protection of Shareholders in International Law*, at 75 ("If such acts constitute 'a step directly aimed at his rights,' for instance, a confiscation of shares or a law restricting participation in assemblies or collection of dividends to national shareholders, then the State of nationality of any individual shareholder may interpose in his favour, irrespective of the nationality of the company.").

The NAFTA was drafted with this background of customary international law principles in mind. The drafters of the NAFTA were aware of the difference between direct injury to an investor and injury to an investment. The drafters also recognized that investors often choose to carry out their investment activities in a State through a locally-incorporated entity. However, because of the customary international law principle of non-responsibility, customary international law remedies were not available to remedy injuries to such locally-incorporated entities. Thus, for example, no customary international law remedy could be sought against the United States on behalf of a United States corporation of which a Canadian investor was the sole shareholder.

To address this situation, the drafters of Chapter Eleven included Article 1117. Article 1117 creates a derivative right of action for the benefit of an *investor* that derogates from customary international law. By doing so, Article 1117 addresses the situation where the alleged violation of Chapter Eleven directly impacts a locally-incorporated subsidiary and also ensures that

the claimant will be of a nationality different from that of the respondent State. See Daniel M. Price & P. Bryan Christy, III, *An Overview of the NAFTA Investment Chapter: Substantive Rules and Investor-State Dispute Settlement*, in THE NORTH AMERICAN FREE TRADE AGREEMENT: A NEW FRONTIER IN INTERNATIONAL TRADE AND INVESTMENT IN THE AMERICAS 165, 177 (Judith H. Bello et al. eds., 1994) (“Article 1117 is intended to resolve the *Barcelona Traction* problem by permitting the investor to assert a claim for injury to its investment even where the investor itself does not suffer loss or damage independent from that of the injury to its investment.”).

The new right of action created by Article 1117 is a purely derivative right of action. The language of the article provides that it can be exercised only in cases where “*the enterprise* [not the investor] has incurred loss or damage by reason of, or arising out of, the breach.” Similarly, as Article 1135 makes clear, any award under Article 1117 for an injury to an enterprise must be paid to the enterprise, not to the investor. See NAFTA art. 1135(2)(b).

Thus, where an investor suffers a direct injury—for example, where the investor is denied its right to a declared dividend or its right to vote its shares—the investor has standing to bring a claim under Article 1116 in accordance with customary international law principles. Where, however, the alleged injury is suffered by the corporation itself—for example, where an asset held by the corporation is nationalized—Article 1117 provides a right of action for the investor on behalf of its investment. Without Article 1117, the investor would be denied a remedy because its injury is purely derivative of the corporation’s and the locally-incorporated corporation would not have standing to bring a claim against the respondent State. The inclusion of Article 1117 in the NAFTA remedies this problem without extinguishing the distinction between direct and derivative injury or altering the general principle that the corporation, as opposed to its individual shareholders, may alone take action on behalf of the corporation.

(5) *Post-hearing Issues*

(i) *Article 31(3)(a) of Vienna Convention on the Law of Treaties*

Prior to the FTC Interpretation, discussed in 1.b., *supra*, the United States, Mexico and Canada had agreed on the interpretation of Article 1105(1) through submissions in this case. The excerpts below provide the views of the United States on the applicability of Article 31(3)(a) of the Vienna Convention on the Law of Treaties to such an agreement.

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Post-Hearing Submission, July 20, 2001

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All three NAFTA Parties have clearly indicated that they are in agreement regarding the proper interpretation of Article 1105(1) and one aspect of Article 1101(1). . . . In accordance with Article 31(3)(a) of the Vienna Convention on the Law of Treaties, this agreement among the parties to a treaty “shall be taken” into account.

This conclusion finds ample support in the text of the Convention, its *travaux préparatoires* and the writings of commentators. Article 31(3)(a) operates whenever there is agreement between the parties regarding the interpretation of a treaty. It applies if there is “any” agreement between the parties. The provision does not require a formal instrument of agreement. In contrast to paragraph 1 of Article 31, Article 31(3)(a) of the Convention does not use the term “treaty,” as defined in Article 2(1)(a), nor even the term “international agreement” to describe the agreement that must be taken into account. Unlike Articles 31(2)(a) and (b), Article 31(3)(a) is not limited to an agreement “which was made.” See VCLT art. 31(2)(a) (“[a]ny agreement relating to the treaty which was made between all the parties . . .”); art. 31(2)(b) (“any instrument which was made by one or more parties . . .”). The absence of the phrase “which was made” in Article 31(3)(a) further supports the conclusion that Article 31(3)(a) applies to any condition in which the parties are in a state of agreement, as may be evidenced by concordant statements of position. This reading of the provision is consistent with the

context in which the word “agreement” appears: “agreement” under Article 31 cannot *create* a treaty right or obligation, it can only interpret an existing treaty provision.

This reading of Article 31 is also consistent with the preparatory work of the Convention, which recognizes that “agreement” within the Article need not be in any particular form. The views of respected commentators on the Convention further support this reading. For example, Mustafa Yasseen, chairman of the drafting committee for the conference that adopted the Convention, later wrote:

It is above all not necessary that an interpretive agreement be clothed with the same form as that of the treaty it concerns, however solemn and important this treaty may be. The interpretive agreement may be in simplified form, may be realized by an exchange of notes or even by concordant oral declarations.

Methanex’s arguments at the hearing to the contrary are without merit. . . . Methanex’s contention that any agreement on interpretation can have only prospective effect is wrong. Contrary to Methanex’s suggestion, the general rule is that interpretations of a treaty provision—whether by the treaty parties or by an international tribunal—are retroactive in effect, since an interpretation does not change the content of a provision, it merely clarifies what the provision always meant.

\* \* \* \*

. . . Methanex’s contention that amendments to the NAFTA must first be subjected to municipal “political processes” is misplaced. The NAFTA Parties’ reading of the relevant provisions of the NAFTA are interpretations, and not “amendments” as Methanex contends. Methanex is incorrect in suggesting that the United States cannot interpret these provisions without subjecting its interpretations to municipal “political processes.”

For the reasons set forth here and in the United States’ oral submissions, the written and oral submissions of all of the NAFTA Parties evidence agreement on issues of interpretation of Articles 1101(1) and 1105(1) of the NAFTA. Pursuant to Article 31(3)(a)

of the Vienna Convention, these agreements should be taken into account by this Tribunal.

\* \* \* \*

(ii) *Applicability of Oil Platforms case to jurisdictional issues*

The excerpts below provide the views of the United States on the application of the methodology for deciding ICJ Jurisdiction set forth in *Oil Platforms (Iran v. U.S.)*, 1996 I.C.J. 803 (Dec. 12).

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**Post-Hearing Submission, July 20, 2001**

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**B. The *Oil Platforms* Methodology for Deciding ICJ Jurisdiction**

In *Oil Platforms* (Iran v. U.S.), 1996 I.C.J. 803 (Dec. 12), the International Court of Justice addressed preliminary objections to the Court's jurisdiction that, under the relevant compromissory clause, involved determining whether a dispute regarding the interpretation or application of a treaty existed. In doing so, the I.C.J. analyzed the treaty's substantive provisions to determine the parameters of the obligations imposed and applied the facts alleged by the applicant to each of those provisions to test whether a genuine dispute was present requiring resolution in a merits phase. In a separate opinion, Judge Higgins explained the methodology for the Court's approach. In another separate opinion, Judge Shahabuddeen explained why he believed the Court's approach went too far in considering the merits at a preliminary phase.

The *Oil Platforms* approach—testing the facts alleged against the substantive treaty provisions implicated to determine whether the claim falls within the compromissory clause—is consistent with the positions of Methanex and the United States regarding the standard this Tribunal should apply in resolving the United States' preliminary objections on jurisdictional and admissibility grounds in this NAFTA Chapter Eleven arbitration brought under the UNCITRAL Arbitration Rules. Therefore, the *Oil Platforms*



case supports the dismissal of Methanex's claims at this preliminary phase.

\* \* \* \*

### C. The *Oil Platforms* Approach To Preliminary Objections, As Elaborated By Judge Higgins, Is Consistent With That Of The Parties

Although articulated in the context of a specific procedural regime, governed by its own special statute and rules, the I.C.J.'s methodology for resolving the preliminary objections in the *Oil Platforms* case, as elaborated by Judge Higgins, represents its current approach to the disposition of preliminary objections to the I.C.J.'s jurisdiction. And although *Oil Platforms* does not address all of the aspects of the standard of decision applicable in a NAFTA Chapter Eleven case under the UNCITRAL Arbitration Rules, that approach is entirely consistent with the standard propounded by both of the parties here.

As in Judge Higgins' analysis, the parties' methodology calls upon the Tribunal to "accept *pro tem* the facts as alleged by [the claimant] to be true and [in] that light to interpret [the Treaty] for jurisdictional purposes . . . that is to say, to see if on the basis of [the claimant's] claims of fact there could occur a violation of one or more of [the treaty's substantive obligations]." *Id.* at 856 ¶ 32. Indeed, the parties' approach here posits the same assumptions for purposes of admissibility. As in *Oil Platforms*, this may require a "very substantive and detailed analysis of the claims" at the preliminary stage, *id.* at 849 ¶ 11, and cannot be accomplished "on an impressionistic basis." *Id.* at 855 ¶ 29. Finally, here, as in *Oil Platforms*, there is no "jurisdictional presumption in favour of plaintiff." *Id.* at 857 ¶ 35.

In contrast, Judge Shahabuddeen's substantially more restrictive approach to jurisdictional objections in I.C.J. practice is not compelling, particularly in the context of a NAFTA Chapter Eleven proceeding under the UNCITRAL rules.

First, Judge Shahabuddeen's approach was not followed by the Court in *Oil Platforms*. A separate opinion the reasoning of which was rejected by the I.C.J. has little persuasive value here.

Second, Judge Shahabuddeen's approach was based in sub-

stantial part on a specific provision of the I.C.J. Rules not replicated in NAFTA Chapter Eleven or the UNCITRAL Arbitration Rules. The provision in question required, in Judge Shahabuddeen's view, the I.C.J. to refrain from *any* decision relating to the merits in addressing preliminary objections. *See* 1996 I.C.J. at 829–30 (citing I.C.J. Rules art. 79(5) (“proceedings on the merits shall be suspended” upon preliminary objection)). By contrast, the UNCITRAL Arbitration Rules' recognition of the authority to issue interim and partial awards makes clear that this Tribunal can, if it deems it appropriate, organize the proceedings into different phases and address the merits of the issues raised in each phase. *See* UNCITRAL Arbitration Rules art. 32(1).

Finally, Judge Shahabuddeen's approach would not be conducive to the efficient resolution of this dispute. It would serve no purpose to proceed to an evidentiary hearing where, as here, it is apparent that the claims fail as a matter of law.

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### Post-Hearing Submission, July 27, 2001

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. . . Judge Shahabuddeen's approach focuses on the text of the specific compromissory clauses at issue. *See Oil Platforms*, 1996 I.C.J. at 830 (separate opinion of Judge Shahabuddeen) (In determining which I.C.J. test on jurisdiction should be followed, “[t]he solution is to be found in returning to the terms of the compromissory clause.”). Accordingly, if this Tribunal were to apply Judge Shahabuddeen's approach, it would be required definitively to interpret, at this preliminary phase, the compromissory clauses—*i.e.*, Articles 1101(1), 1116(1) and 1117(1)—at issue here, and just as Judge Shahabuddeen definitively determined the meaning of the phrase “any dispute,” this Tribunal would be required definitively to determine the meaning of the phrases “relating to,” “by reason of, or arising out of,” and “loss or damage,” and would be required definitively to determine what constitutes a “breach” of the Chapter Eleven obligations—*i.e.*, those embodied in Articles 1102, 1105(1) and 1110—at issue. Thus, for the reasons explained in the United States' prior submissions and at the hearing, even under Judge Shahabuddeen's approach,

dismissal would be compelled under the carefully delimited compromissory clauses set forth in Articles 1101(1), 1116(1) and 1117(1).

\* \* \* \*

***b. ADF Group Inc. v. United States***

ADF Group Inc. (“ADF”), a Canadian corporation that designs, engineers, fabricates and erects structural steel, submitted a claim under Chapter Eleven of the NAFTA and the ICSID Arbitration (Additional Facility) Rules on its own behalf and on behalf of ADF International Inc., its Florida subsidiary. ADF claimed damages for alleged injuries resulting from the federal Surface Transportation Assistance Act of 1982 and the Department of Transportation’s implementing regulations, which require that federally-funded state highway projects use domestically-produced steel, with certain exceptions. At issue in this case was a procurement contract between the Department of Transportation of the State of Virginia and Shirley Contracting Corporation and a subcontract between Shirley Contracting Corporation and ADF International. The Virginia project, reconstruction of an interstate highway interchange, was partially funded from federal sources from the Federal Highway Administration. The contract between the Virginia Department of Transportation and Shirley Contracting Corporation included a “Buy America” provision required under regulations implementing the Surface Transportation Assistance Act of 1982, Pub. L. No. 97-424, 96 Stat. 2097 (1983). The provision provided that “[e]xcept as otherwise specified, all iron and steel products . . . incorporated for use on this project shall be produced in the United States of America; unless the use of any such items will increase the cost of the overall project by more than 25%.”

ADF claimed violations of the national treatment requirement of Article 1102, the minimum standard of treatment requirement of Article 1105(1), and the prohibition against performance requirements contained in Article 1106. It sought \$90 million in damages. Excerpts below from the

United States Counter-Memorial provide the views of the United States that the claims under Articles 1102 and 1106 are precluded by the government procurement exceptions in Article 1108, and that ADF's national treatment claim is baseless in any event.

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**I. ADF's Article 1102 and 1106 Claims Are Precluded by the Government Procurement Exceptions in Article 1108**

\* \* \* \*

**A. Under the Plain Terms of Article 1108, ADF's Claims Are Excluded Because They Are Based on "Procurement By A Party"**

\* \* \* \*

[t]he ordinary meaning of the term "procurement by a Party" compels dismissal of ADF's claims of violation of Chapter Eleven's requirement of national treatment and its prohibition of performance requirements. This conclusion is supported by consideration of the term in its context. [citing Vienna Convention, art. 31(1)]. It is further confirmed by a review of the NAFTA Parties' "subsequent practice in the application of the treaty" [*Id.* art. 31(3)(b)] and the "rules of international law applicable in the relations between the parties." [*Id.* art. 31(3)(c)].

\* \* \* \*

Article 1108(7) provides that "Articles 1102, 1103 and 1107 do not apply to: (a) procurement by a Party or a state enterprise." Article 1108(8)(b) provides: "The provisions of Article 1106(1)(b), (c), (f) and (g), and (3)(a) and (b) do not apply to procurement by a Party or a state enterprise." The term "procurement" is not defined in the NAFTA. The ordinary meaning of the term on its face, however, encompasses any and all forms of procurement by a NAFTA Party. This reading is confirmed by the French and Spanish versions of the NAFTA, which each use the generic term for "purchases" in those languages.

The disputing parties agree that, when the Commonwealth of Virginia purchased goods and services from Shirley (which, in turn,

contracted with ADF) for the construction of improvements to the Springfield Interchange, Virginia engaged in procurement. . . . There is no doubt, of course, that Virginia is one of the United States of America. Equally indisputable is that ADF's claims under Articles 1102 and 1106 hinge on Virginia's inclusion in its contract with Shirley of a provision requiring all steel products used in the Project to have been produced in the United States. Indeed, it cannot be denied that, but for the inclusion of that provision in the procurement contract, there would be no government conduct of which ADF might have a basis to claim money damages under Articles 1116 and 1117.

ADF's claims, therefore, are founded on conduct that constitutes "procurement by a Party": the parties agree that the Commonwealth's conduct constitutes procurement; the Commonwealth is a governmental unit of the United States; and ADF's claims are founded on the conduct that constitutes procurement. Under the plain terms of Article 1108, the provisions of Articles 1102 and 1106 on which ADF relies "do not apply." ADF's claims under those Articles thus must fail.

\* \* \* \*

The context in which Article 1108's exceptions are stated provides further support for dismissal of ADF's claims based on Articles 1102 and 1106. Chapter Ten of the NAFTA, entitled "Government Procurement," sets forth the NAFTA's principal rules with respect to such procurement. Among other things, and as ADF acknowledges, "Chapter Ten contains its own national treatment and most favored nation obligations (Article 1003) and its own prohibition against performance requirements (Article 1006)."

Not all government procurement, however, is subjected to the application of Chapter Ten. Most significantly, Chapter Ten in its current form applies only to measures relating to procurement by specified federal government entities. As in other international agreements on procurement (notably, the WTO Government Procurement Agreement), this coverage is defined in terms of the entities that conduct procurement and award government contracts, not in terms of how the government procurement is financed. Although the Chapter provides a framework for adding coverage of measures relating to procurement by state and provin-

cial government entities, such measures are not currently subject to the application of Chapter Ten.

The purpose of the government procurement exception in Article 1108, considered in this context, is clear. The NAFTA Parties intended to subject only certain categories of government procurement measures to the rules providing for national treatment and the prohibition of performance requirements. The categories are defined by the type of entity that conducts a procurement, based in part on which level of government conducts the procurement. Those categories—as of today consisting only of procurement by federal government entities—were included within the scope of Chapter Ten and subjected to Articles 1003 and 1006.

The NAFTA Parties did not intend to subject other categories of procurement measures—notably, measures relating to procurement by state and provincial government entities—to those rules, and therefore did not include those categories within the scope of Chapter Ten. Consistent with these goals, Article 1108 provides an exception from those provisions in Chapter Eleven for any and all government procurement. It thereby ensures that state and provincial procurement are not subjected to any national-treatment or performance-requirement obligations, and that federal procurement is subjected only to the national-treatment and performance-requirement provisions that were drafted specifically with government procurement in mind—those in Chapter Ten.

Here, it is undisputed that the Springfield Interchange Project constituted government procurement by a state government entity. That procurement, therefore, was excluded from the national-treatment and performance-requirement obligations in the NAFTA by operation of the current scope of Chapter Ten and the exclusion of “procurement by a Party” in Article 1108.

\* \* \* \*

Contemporaneous statements made by the NAFTA Parties in implementing the NAFTA also make clear the Parties’ understanding that the NAFTA does not subject domestic-content restrictions on state procurement to national-treatment or performance-requirement obligations. Canada’s Statement of Implementation, published in its *Official Gazette* on the day the

NAFTA entered into force, states unequivocally (albeit with some regret) that the 1982 Act's Buy America program was *not* subject to such provisions:

While chapter ten represents a significant expansion of opportunities for Canadian suppliers of goods and services, it falls short of the comprehensive agreement sought by Canada. The Government will, therefore, continue to press its NAFTA partners to liberalize their restrictive government procurement laws and practices. In particular, the Government will use the further negotiations called for in the Agreement to negotiate Canadian access to Small Business Set-Aside programs and *transportation procurements currently restricted under Buy America Programs*. Canada considers this to be part of the unfinished agenda in the procurement negotiations, and will pursue these concerns at every opportunity.

Obviously, if ADF were correct that suppliers of Canadian goods and services already had access to "transportation procurements currently restricted under Buy America Programs," Canada would have had no cause to pursue negotiations for such access "at every opportunity." The Canadian Government's understanding at the time the NAFTA went into effect does not conform to that of ADF—for the simple reason that ADF's understanding is erroneous.

The United States' contemporaneous Statement of Administrative Action is equally clear that state-level procurement funded through federal programs like Buy America is not covered by Chapter Ten:

The rules of Chapter Ten do not apply to certain types of purchases by the U.S. Government, among them: . . . procurements by state and local governments, *including procurements funded by federal grants, such as those made pursuant to . . . the Federal Aid Highway Act* (23 U.S.C. 101 et seq.).

The NAFTA Parties' implementation of the Agreement accorded with the words of the Canadian Statement of Implemen-

tation and the United States' Statement of Administrative Action. As demonstrated in the accompanying Expert Reports of Gerald H. Stobo and Claus von Wobeser, each of the Parties continued to maintain federal assistance programs for state and provincial government procurement. For example, in Canada, the federal government provides billions of dollars to the provinces for highway construction and other infrastructure development. Many of the provinces receiving that federal assistance discriminate on the basis of nationality in their procurement practices, including Ontario, for example, which maintains a 10 percent price preference for Canadian structural steel bids in provincial procurements. Similarly, in Mexico, the federal Acquisitions and Public Works Laws prescribe price preferences for Mexican goods and services. Those laws apply to procurement by the states that is wholly or partially funded by the federal government.

\* \* \* \*

While the 1933 Act's Buy American requirements—which govern direct federal procurement—for U.S. government agencies had to be modified for Canadian and Mexican goods and service suppliers after the NAFTA was implemented, no modifications were required under the 1982 Act's Buy America requirements for state procurement since this program was not within the scope of NAFTA's coverage. Indeed, Canadian companies have chosen to establish a presence in the United States precisely so that they will be able to qualify for supplying certain federally-funded procurement contracts with the states.

The conclusion that restrictions on state procurement are not subject to national-treatment and performance-requirement obligations is also supported by a review of the development of "relevant rules of international law applicable in the relations between the parties." [citing Vienna Convention, art. 31(3)(c).] Historically, domestic content requirements for government procurement have been adopted in most, if not all, countries. This special treatment of procurement has been used in furtherance of various social and economic policy objectives. Procurement by subcentral government entities has historically been exempt even from the limited obligations imposed on central government procurement in trade agreements. While the NAFTA may be credited for having opened



up significant segments of procurement markets to the nationals of other NAFTA Parties, the rules governing procurement as well as the scope of entities covered by those rules are limited. In light of the historical treatment of government procurement in trade agreements, it is difficult to believe that the NAFTA Parties would have subjected procurement programs like the 1982 Act's Buy America program to obligations such as national treatment and the prohibition on performance requirements absent a clear and unequivocal expression of an intent to do so. The NAFTA contains no such expression.

**B. ADF's Argument That The Government Procurement Exceptions Do Not Apply Is Without Merit And Would Lead To Manifestly Unreasonable Results**

ADF's three arguments that Article 1108's government procurement exceptions are inapplicable are without merit. Moreover, ADF's interpretation of the provision would violate the rule of interpretation requiring the avoidance of constructions of a treaty that lead to manifestly absurd or unreasonable results.

*First*, . . . In the absence of a procurement, the 1982 Act's Buy America program would have no effect on ADF. The only way in which the 1982 Act's Buy America program affected ADF was through Virginia's inclusion of a provision approved under that program into its procurement contract with Shirley. The fact that the provision was included as a result of a program for highway construction procurement that involved give-and-take between different government units at different levels within the United States does not make the conduct at issue any less "procurement by a Party." The exclusion of "procurement by a Party" thus clearly forecloses ADF's claims under Articles 1102 and 1106.

\* \* \* \*

*Second*, . . . ADF is quite correct that the federal-aid highway program provides for funding and other assistance that cannot be considered procurement under Article 1001(5)(a). That funding and assistance, however, is not at issue here: ADF does not, and cannot, complain about the federal grants that made it possible for the Project to go forward in its current form. Instead,

ADF complains about the provision mandating a preference for domestically produced materials that was required to be included in VDOT's procurement contract as a condition to receiving federal grants. That requirement is a measure relating to procurement (although not, as described above, a measure relating to procurement by a covered entity). It clearly is not a grant or assistance. Article 1001(5)'s clarification that grants are not procurement does not change the conclusion that what ADF complains of here is plainly "procurement by a Party."

\* \* \* \*

*Third*, contrary to ADF's assertion, the fact that the Buy America provisions of the Clean Water Act are set out in the United States' annex to the NAFTA as a non-conforming measure maintained by a Party at the federal level that is excepted from the application of Article 1106 does not imply that Articles 1102 and 1106 extend to the 1982 Act requirements at issue here. Unlike the 1982 Act, the Clean Water Act program applied its domestic-content requirement in a context other than government procurement. It therefore required a listing in the annex as a non-conforming measure, since Article 1108's government procurement exception was narrower than the scope of that program.

\* \* \* \*

*Finally*, it would make no sense for state-level procurement in compliance with the 1982 Act to be exempt from national-treatment and performance-requirement obligations under the very chapter of the NAFTA that expressly governs government procurement and nonetheless be subject to challenge by an investor under Chapter Eleven. Yet, this is the result that ADF urges upon this Tribunal.

\* \* \* \*

## II. ADF's National Treatment Claim Is Baseless in Any Event

\* \* \* \*

### A. Chapter Eleven Governs Investment, Not Trade

Chapter Eleven of the NAFTA exclusively governs investment, and Article 1102 provides for national treatment of *investors* and

their *investments*. That Article provides in pertinent part as follows (emphasis added):

1. Each Party shall accord to *investors* of another Party treatment no less favorable than that it accords, *in like circumstances*, to its own investors *with respect to* the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of *investments*.

2. Each Party shall accord to *investments* of investors of another Party treatment no less favorable than that it accords, *in like circumstances*, to investments of its own investors *with respect to* the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of *investments*.

NAFTA art. 1102(1)–(2). Thus, Article 1102’s focus is on comparing treatment with respect to U.S. investors and U.S.-owned investments as compared to Canadian or Mexican investors and Canadian- or Mexican-owned investments that are in like circumstances. Article 1102 does not prescribe national treatment obligations with respect to Canadian- or Mexican-origin goods or services. Those areas are covered in other chapters of the NAFTA and are *not* subject to Chapter Eleven investor-State dispute resolution. The central defect in ADF’s Article 1102 claim is that it fails to distinguish between *trade* and *investment*. This fundamental misconception permeates ADF’s Memorial.

An Article 1102 claim may only be established if investors or their investments have been denied national treatment with respect to investments in the territory of the Party. Here, both U.S.-owned companies and ADF were subject to the same obligation to fabricate steel in the United States. That the Buy America provisions favor U.S. *goods* over foreign *goods* is, by itself, immaterial. ADF’s claim that the measures discriminate against Canadian steel in favor of U.S. steel thus does not constitute a violation of Article 1102.

## B. ADF’s Investment Was Not Denied National Treatment Under Article 1102(2)

\* \* \* \*

. . . ADF’s claim that its investment, ADF International, has been denied national treatment because the measures “limit [ADF

International's] ability to import fabricated steel and put ADF International at a competitive disadvantage vi[s]-à-vis domestic fabricators," is without merit. No entity selling steel for use in the Project—whether U.S.-owned or foreign-owned—is permitted to use steel fabricated outside of the United States. ADF's claim urges not that it be accorded the same treatment as U.S.-owned steel fabricators, but that it be accorded *better* treatment—that it be granted a right to subcontract fabrication work outside the United States that its competitors do not have. That, however, is not a national treatment claim and it is not cognizable under Article 1102.

Similarly, ADF errs in suggesting that "[o]nly ADF International faces the choices of either expanding its U.S. facility, subcontracting work to its competitors or abandoning significant contract opportunities." Every U.S.-owned steel fabricator whose facilities were small and lacked the fracture-critical certifications necessary to meet the Project specifications would have faced precisely the same choices. Because the contract provision applies equally to all investors and investments regardless of the nationality of their ownership, there is no national treatment violation here.

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### C. ADF Group Has Not Been Denied National Treatment Under Article 1102(1)

ADF's claims that ADF Group was denied national treatment fare no better. . . . No investor, whether U.S. or foreign-owned could have, consistent with the contract's requirements, fabricated the steel outside of the United States and then supplied it for use in the Project.

Moreover, to the extent that ADF's claim is that ADF Group was denied national treatment with respect to steel it purchased in Canada, that claim also fails. Steel owned by a Canadian in Canada is . . . not an investment covered by Chapter Eleven. . . .

. . . Contrary to ADF's contention, nothing in Article 1102 guarantees an "ability to freely transfer goods and services between the parent corporation and its subsidiary." . . . Also incorrect is ADF's assertion that Article 1102 prohibits a NAFTA Party

from restricting an investor's management, conduct or operation of its investment. Rather, Article 1102 prohibits a NAFTA Party from adopting such measures only to the extent that its own nationals and the investments of its nationals in like circumstances with foreign investors and investments are accorded treatment that is more favorable. As set forth above, ADF was accorded treatment no less favorable than that accorded to U.S. investors in like circumstances. ADF's national treatment claim thus fails.

*Finally*, ADF errs in claiming that it "was prohibited from [fabricating steel in Canada and selling it to ADF International] because *its facilities in Canada* were treated less favorably than any like facilities in the United States." ADF's facilities in Canada are neither an "investor" nor an "investment" within Chapter Eleven. ADF's facility in Canada is not an "investor"; that facility has not made, is not making and does not seek to make an investment in the United States. *See* NAFTA art. 1139 (defining "investor"). Nor is that facility an "investment" within the scope of Chapter Eleven. . . . Because ADF's facilities in Canada are neither an investor nor an investment as defined by the NAFTA, those facilities cannot be the subject of an Article 1102 national treatment violation.

#### D. The Case Law Cited By ADF Does Not Support Its Claims

ADF's allegation that it was denied national treatment by the purported failure of the United States to "follow constant case law" is groundless. . . . The cases cited by ADF all concern the interpretation of the 1933 Buy American Act, a direct federal procurement statute not at issue in this case. Those cases do not, and cannot, establish less favorable treatment than that accorded U.S. investors and investments *in like circumstances* with ADF, as required by Article 1102. . . .

\* \* \* \*

ADF therefore cannot establish—nor does it even attempt to establish—that the claimants in the cases it cites are in like circumstances with it or ADF International. Its claim under Article 1102 based on the cases it cites therefore must fail.

In addition, it is undisputed that the FHWA has consistently

interpreted the standard in the 1982 Act to require that all manufacturing activities, including “rolling, extruding, machining, bending, grinding, drilling and coating” must take place in the United States. It is also undisputed that the FHWA so interpreted the regulation in its dealings with ADF. ADF therefore cannot establish—nor has it attempted to establish—that it was accorded treatment less favorable than any investor or investment in like circumstances with it (*i.e.*, those investors and investments supplying steel to a federally-funded state project governed by the same statutory and regulatory regime).

Finally, ADF’s reliance for support on the award in *S.D. Myers v. Canada* is misplaced, as the reasoning of that tribunal was flawed in certain respects essential to ADF’s argument here. A brief review of the *S.D. Myers* decision reveals the flaw common to ADF’s claims here.

S.D. Myers, Inc. an Ohio corporation that remediates PCB waste, was found by the tribunal to be an investor. The tribunal also found that Myers Canada, Inc., a Canadian corporation that provided marketing services, was an investment. The tribunal, in accordance with Article 1102, should have compared the treatment with respect to investments accorded to Myers Canada and S.D. Myers with that accorded to companies that were in like circumstances with each of them. Presumably, given the nature of the measure in that case, those companies would have been Canadian-owned companies engaged in the marketing of PCB services and their Canadian owners, respectively.

Instead, the *S.D. Myers* tribunal found S.D. Myers and Myers Canada Inc. to be in like circumstances with Canadian companies engaged in the business of providing PCB waste remediation services. *S.D. Myers v. Canada* at ¶ 251. Myers Canada, however, was not in the business of remediating PCB waste; it was in the business of marketing such services. It was thus not in like circumstances with companies that remediated PCB waste. S.D. Myers, the U.S. investor, was in the business of remediating PCB waste. While the measure at issue prevented S.D. Myers from importing PCB waste from Canada to remediate at S.D. Myers’ plant in the United States, it did not restrict S.D. Myers’ ability to make investments in Canada, including investments in companies that marketed or provided PCB remediation services in

Canada. This treatment of S.D. Myers, therefore, was not “treatment . . . with respect to . . . investments,” as required to implicate Article 1102. Rather, the measure related to S.D. Myers’ provision of its own services in the United States to customers in Canada.

So too here. The Main Contract’s provisions do not impact ADF International’s ability to fabricate steel in the United States or to supply such steel: there are no such restrictions. And ADF Group’s inability to fabricate steel for the Project in Canada is not “treatment . . . with respect to . . . investments.” ADF’s claim under Article 1102 is without merit.

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***c. The Loewen Group, Inc. and Raymond L. Loewen v. United States of America***

The Loewen Group, Inc. (“TLGI”), a Canadian corporation involved in the death-care industry, and Raymond L. Loewen, its chairman and CEO at the time of the events at issue, submitted claims under Chapter Eleven of the NAFTA and the ICSID Arbitration (Additional Facility) Rules in their individual capacities and on behalf of Loewen Group International, Inc., TLGI’s U.S. subsidiary (collectively “Loewen”). Loewen sought damages for alleged injuries arising out of litigation in Mississippi state courts in which the company was involved in 1995–96. Loewen alleged violations of three provisions of NAFTA—the anti-discrimination principles set forth in Article 1102, the minimum standard of treatment required under Article 1105, and the prohibition against uncompensated expropriation set forth in Article 1110. Loewen requested damages in excess of \$600 million.

In its Counter-Memorial, the United States summarized Loewen’s claims as follows:

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. . . The claim arises from a lawsuit exclusively between private litigants that proceeded in the courts of the State of Mississippi and was ultimately settled by agreement of those litigants.

The underlying lawsuit arose, in part, from Loewen's own aggressive business practices in the acquisition of funeral homes, for which the company is now well-known. In that lawsuit, a Mississippi jury found that Loewen had intentionally breached certain contracts and defrauded a competitor as part of a broader scheme to destroy competition and raise prices in local funeral home markets. Although Loewen initially appealed the jury's verdict and believed that its chances of success on appeal were overwhelmingly favorable, it chose instead to settle the dispute out of court rather than continue with the appellate process.

According to Claimants, the United States is liable under the NAFTA because, they contend, the Mississippi trial court wrongly permitted the lawyers for the opposing party to make inflammatory statements to the jury, resulting in a judgment that Claimants argue was unjust. Although that judgment was undeniably subject to appeal in higher courts, Claimants allege that Loewen was effectively denied its right to appeal when the Mississippi Supreme Court declined to lower the amount of a supersedeas bond that would have stayed execution of the judgment pending appeal.

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The United States objected to the jurisdiction and competence of the tribunal. In a decision issued on January 9, 2001 (available at [www.state.gov/s/l](http://www.state.gov/s/l) in the International Claims and Investment Disputes database), the tribunal rejected one of the United States' objections to jurisdiction, and decided to hear the other objections with the merits of the case. In October 2001, the tribunal held a hearing on liability and on the remaining jurisdictional objections. At the end of 2001 the case was still pending.

The excerpts below from the United States Counter-Memorial of March 30, 2001, Rejoinder of August 27, 2001, and Response to the November 9, 2001 Submissions by the Government of Canada and Mexico pursuant to NAFTA Article 28, December 7, 2001, provide its views on the absence of a *prima facie* claim of discrimination under Article 1102, the standards to be applied to denial of justice claims under Article 1105, and the inapplicability of other aspects of Article 1105.



U.S. Counter-Memorial, March 30, 2001

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#### IV. THE MISSISSIPPI COURT JUDGMENTS DID NOT VIOLATE ANY OF THE SUBSTANTIVE PROVISIONS OF NAFTA CHAPTER ELEVEN

It is well-recognized that judicial acts can violate international obligations in only the most extreme and unusual of circumstances, and that judicial acts are afforded a far greater presumption of regularity under customary international law than are legislative or administrative acts. *See, e.g., Putnam v. United Mexican States, Opinions of Commissioners* 225 (U.S.-Mex. Cl. Comm'n of Sept. 8, 1923) ("A question which has been passed on in courts of different jurisdiction by the local judges, subject to protective proceedings, must be presumed to have been fairly determined."); Therefore, while all NAFTA Chapter Eleven claimants bear the burden of proving a breach of the NAFTA's substantive provisions, *see Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award at ¶¶ 83–84 (Nov. 1, 1999), that burden is even greater where, as here, the challenged measures are actions of a domestic judiciary. As demonstrated below, Claimants cannot meet their substantial burden of proof in this case.

##### A. Claimants Fail To Establish A Violation Of NAFTA Article 1102

Claimants assert that, by "subjecting Loewen to extensive, irrelevant, and highly prejudicial comments about its own nationality and that of O'Keefe, the Mississippi courts treated Loewen less favorably than it [sic] treats United States or Mississippi defendants 'in like circumstances,'" in violation of NAFTA Article 1102. This claim fails for two reasons. First, as a legal matter, Claimants do not even attempt to meet the requisite elements of the national treatment standard set forth in Article 1102. Second, as a factual matter, there is simply no basis in the record for Claimants' wild allegations that the Mississippi courts discriminated against Loewen on the basis of a supposed "anti-Canadian" bias.

### 1. *Claimants Fail To Assert A Prima Facie Claim Under NAFTA Article 1102*

Although Claimants offer a catalog of allegedly prejudicial comments made and elicited by O’Keefe’s counsel—which . . . is wholly unfounded in the record—Claimants decline even to discuss the most fundamental requirements of Article 1102: namely, that either Claimants or their investments received treatment “less favorable” than any treatment accorded U.S. investors and investments “in like circumstances.” See NAFTA Article 1102.

Article 1102(1) and (2) require each NAFTA Party to accord to investors of another Party (and their investments) treatment no less favorable than the treatment accorded in like circumstances to its own investors (and their investments) with respect to investments. This is a relative standard because the treatment a Party affords its own nationals provides the sole basis of comparison for the treatment it owes to investors of another Party (and to their investments). The standard in Article 1102 is also a limited one: it does not afford NAFTA investors and their investments protection in all instances. It is subject to a number of exceptions (*see, e.g.*, NAFTA Articles 1108 and 2103 and Annex II (Reservations for Future Measures)) and it applies only in cases of “like circumstances.”

Thus, to establish a violation of Article 1102, more is required than merely showing that Claimants received treatment that they contend is adverse. Rather, Claimants must show that they and/or their investments, when compared to U.S. investors or investments *in like circumstances*, received treatment that was *less favorable*. Claimants, however, offer neither argument nor evidence to establish these fundamental elements of an Article 1102 comparison.

Moreover, the United States is unaware of any international case—and Claimants identify none—in which a breach of a national treatment obligation has been found based upon treatment accorded an investor by a court in a civil trial. Indeed, in such a situation, the appropriate basis for comparison under Article 1102 may be particularly difficult to specify. For example, many of the circumstances facing the litigants in a civil jury trial—the facts underlying the dispute, the parties’ counsel, their strategic approaches and tactical choices, the demeanor of the witnesses,

the members of the jury, etc.—will vary at least to some extent (and, in many respects, to a great extent) from case to case.

Determining what the “like circumstances” are for any Article 1102 analysis depends on the nature of the treatment at issue and all the relevant facts of the case. While in an appropriate case of civil litigation a claimant may be able to satisfy the “in like circumstances” requirement, in other situations one could reasonably question whether it is possible to do so. *See, e.g., Joseph de Pencier, 17th Annual Symposium Investment, Sovereignty, and Justice: Arbitration Under NAFTA Chapter Eleven*, 23 Hastings Int’l & Comp. L. Rev. 409, 413 (2000) (“If there are no domestic investors with which to compare a foreign investor, how can the foreign investor receive ‘less favorable treatment’ than, let alone be ‘in like circumstances’ with, domestic investors?”). Here, however, Claimants offer nothing but silence on the application of the “like circumstances” requirement to the facts of this case. Claimants have thus failed even to begin to carry their burden of proving a violation of NAFTA Article 1102 and, as a result, their claim must be rejected.

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## B. Claimants Fail To Establish A Violation Of NAFTA Article 1105

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### 1. *The Availability of Further Appeals Defeats Claimants’ Article 1105 Claim as a Matter of Law*

The international minimum standard incorporated into Article 1105(1) requires the Tribunal to consider the United States’ system of justice as a whole—including its mechanisms for correcting any lower court errors on appeal—in assessing whether there was a denial of justice in this case. That the Tribunal must consider the entirety of the United States’ system of justice stems from the nature of the customary international law obligation that gives rise to State responsibility for denial of justice.

It is a requirement of customary international law with respect to the treatment of aliens that a State provide a minimum level of internal security and law and order. Customary international

law thus requires a State to provide a minimum level of police protection for persons and property within its territory. As discussed further below, a failure to meet this requirement with respect to the persons and property of aliens breaches the customary standard of full protection and security referenced in Article 1105(1). . . . Customary international law also requires that States provide aliens a minimally adequate system of justice for resolving disputes between private parties. Failure to provide a system in which an alien can vindicate his claims may result in a breach of customary international law generally known as a “denial of justice.”

In assessing whether this customary international law standard has been met, it is important to bear in mind two fundamental premises. First, international law does not require that a State’s system of justice take any specific form: international law is indifferent whether the system relies for adjudication on appointed jurists, elected jurists, businessmen (as in the French *tribunaux de commerce*) or lay juries. In the words of the *Cotesworth & Powell* tribunal [reprinted in 2 Moore International Arbitration 2050, 2083 (1875)]:

No demand can be founded, as a rule, upon mere objectionable *forms* of procedure or the *mode* of administering justice in the courts of a country; because strangers are presumed to consider these before entering into transactions therein.

The question presented is thus whether the system of justice adopted by the State, whatever its form, is capable of providing the minimum level of justice required by international law. In answering that question, a tribunal necessarily must consider the specific structure of the system of justice a State has adopted [citing *Western Sahara*, 1975 I.C.J. 12, 43–44 (Oct. 16)].

Second, the obligation imposed by international law is to provide a *fundamentally adequate* system of justice as a whole—not one in which all court decisions are immune from error. International law thus recognizes that errors are inevitable in any system of justice. In evaluating a State’s performance of its international obligation to provide an adequate system of justice, a

tribunal must necessarily take into account that system's ability to correct the errors that international law acknowledges to be inevitable. Doing so necessarily requires consideration of any appellate mechanisms made available in a State's system of justice in the case in question.

The United States accepts the Tribunal's ruling that "conduct of an organ of the State shall be considered as an act of the State under international law, whether the organ be legislative, executive or judicial, whatever position it holds in the organisation of the State." Decision on Competence ¶ 70. The United States does not for purposes of this point of argument dispute that an act of an inferior court is imputable to a State, but respectfully submits that such an act cannot ordinarily form the basis for a denial of justice claim. As Professor Greenwood notes, although acts of lower courts are imputable to the State, "it is still necessary to ask whether the act imputable to the State constitutes a violation of international law." Greenwood Opinion ¶ 21. In other words, the proposition the United States advances here is a limited one based on the substantive content of the customary international law of denial of justice—that the "responsibility of the State for a denial of justice arises *only if* the system as a whole produces a denial of justice." Greenwood Opinion ¶ 24 (emphasis added).

That conclusion necessarily encompasses a requirement that claimants attempt (absent obvious futility) to avail themselves of the appellate and review procedures provided by the system of justice whose lower court decisions are allegedly at issue. Judicial systems are organized in a hierarchical structure, reflecting the fact that errors at lower levels, and corrections on review at higher levels, are normal occurrences. This is especially true of trial courts, which are frequently called upon to make immediate decisions, often without the benefit of briefing and with little time for deliberation. As Professor Greenwood notes, "[w]hile legal systems strive for perfection at all levels, they also recognize that such a result is unlikely to be attainable. It is precisely for that reason that legal systems today make extensive provision for appeal and that many also contain other provisions for challenging decisions of the lower courts on grounds which violate constitutional safeguards which are frequently very similar to the standards of international law." Greenwood Opinion ¶ 23. Because

of this hierarchical structure, and the fact that error and correction on appeal are a normal course of events, court action must be viewed as the end result of the multiple decisions resulting from the court system's individual parts, and a denial of justice only ensues once a final decision has issued.

The substantive elements of a "denial of justice" claim reflect this requirement. The Turkish-American Claims Commission in *Pirocaco* put the principle plainly: "As a general rule, a denial of justice resulting from improper action of judicial authorities can be predicated only on a decision of a court of last resort." *Christo G. Pirocaco v. Republic of Turkey* (1923), reprinted in Fred K. Nielsen, *American-Turkish Claims Settlement under the Agreement of December 24, 1923* 587, 599 (1937). Professor Greenwood, in his scholarly examination of substantive elements of a denial of justice claim, succinctly observes:

[T]he obligation which the state owes the foreign national . . . is to provide a system of justice which affords fair, equitable and non-discriminatory treatment. So long as the system itself provides a sufficient guarantee of such treatment, the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal.

Greenwood Opinion ¶ 23.

The general principle that a final judicial decision is required before the elements of a denial of justice claim are established is supported by practical considerations as well. Without it, any decision of a lower tribunal, even an interlocutory order, could be the subject of an international claim. To ensure the coherent development of a domestic legal system, higher courts must be permitted to exercise the supervisory function with which they are entrusted. "It is important for the courts, the legal profession, and society at large that law develop in a harmonious and consistent manner. This requires that there be some central body to expound, clarify and harmonize it." See, e.g., Peter E. Herzog & Delmar Karlen, *Attacks on Judicial Decisions*, in XVI Int'l Encycl. Of Comp. L., Ch. 8 at 5 (Mauro Cappelletti, ed. 1982). The customary international law of denial of justice reflects this consid-

eration and requires, as an element of the claim, that there be a final judicial decision. “[W]hat constitutes a denial of justice in international law is not the isolated decision . . . but only a failure of the system of justice if that system either does not correct that decision where the decision was manifestly unjust or does not offer any effective means of challenging the decision.” Greenwood Opinion ¶ 30.

It is undisputed that the United States judicial system provided a means for correcting lower-court error—including the type of lower-court errors alleged here. Claimants therefore can establish a denial of justice only if they can demonstrate that appellate review was effectively unavailable to resolve their complaints.

## 2. *The Mississippi Litigation Was Not A Denial Of Justice*

An allegation of a denial of justice is an extreme one and is generally disfavored in customary international law. As Judge Tanaka of the International Court of Justice explained in the *Barcelona Traction* case,

[i]t is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.

1970 I.C.J. at 160 (separate opinion of Judge Tanaka). An international tribunal will substitute its judgment for that of a municipal court in only the rarest of circumstances. “[I]t is a matter of the greatest political and international delicacy for one country to disacknowledge the judicial decision of a court of another country. . . .” *Garrison’s Case (U.S. v. Mexico)*, 3 Moore’s Int’l Arb. 3129; see also Harvard Research Draft at 179 (“The rule that those who resort to foreign countries are bound to submit to the local law as expounded by the judicial tribunals is disregarded only under exceptional circumstances.”). This is no different in

the context of NAFTA Chapter Eleven claims. See *Azinian v. United Mexican States*, ICSID Case No. ARB(AF)/97/2, Award at ¶ 105 (Nov. 1, 1999) (noting, in *dictum*, that claimants bear the burden of proving “that the evidence for [the challenged court judgments] was so insubstantial, or so bereft of a basis in law, that the judgments were in effect arbitrary or malicious. . .”).

Given the extreme nature of a denial of justice claim, it is no surprise that the standard of proof regarding such claims is exceptionally high. It is not sufficient to show merely that the challenged judicial action or decision was wrong. Rather, under settled rules of international law, “[o]nly a clear and notorious injustice, visible, to put it thus, at a mere glance, could furnish ground for an international arbitral tribunal of the character of the present, to put aside a national decision presented before it and to scrutinize its grounds of fact and law.” In cases challenging judicial action, “it is necessary to inquire whether the treatment . . . amounts even to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action recognizable by every unbiased man. . . .” *Chattin v. United Mexican States (U.S. v. Mexico)*, *Opinions of Commissioners* 422, 439–40 (1927). Even if Loewen truly had no further means of appealing the O’Keefe jury verdict (which, as we have already shown, is not so), the facts of this case—rather than Claimants’ caricature of them—simply cannot support such an extreme claim.

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### *c. The Decisions Regarding The Supersedeas Bond*

Claimants do not dispute that Mississippi provided them the right to appeal from the trial court’s entry of judgment on the jury verdict. Their disagreement with Mississippi procedure addresses only the conditions under which execution of the lower-court judgment could be suspended while they pursued that right. According to Claimants, the courts of Mississippi “arbitrarily” prevented Loewen from appealing the jury verdict by requiring the company to post a supersedeas bond in the amount of 125 percent of the verdict, which amounted to a procedural denial of justice.

Claimants’ contention is meritless. . . . Supersedeas bond requirements like those at issue in this case are common features



of legal systems around the world. The standards for justifying a departure from such requirements are strict. The Mississippi courts' decisions to deny Loewen's request for a departure, on the record before the courts, were in no way a denial of justice under customary international law. Indeed, Claimants cite no case—and we are aware of none—in which the existence or application of a bond requirement has been found to amount to a denial of justice.

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### 3. *Claimants Misconstrue Article 1105's Obligations Of "Full Protection And Security" And "Fair And Equitable Treatment"*

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#### b. *"Full Protection and Security"*

Claimants' discussion of Article 1105(1)'s guarantee of "full protection and security" rests on a similarly faulty understanding of the provision. As with the standard of "fair and equitable treatment," the "full protection and security" standard is defined by customary international law and does not expand or otherwise modify the minimum standard of treatment under customary international law. Moreover, cases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien. This case does not resemble any of those international decisions in the slightest—neither physical harm or invasion, nor criminal activity, is involved—and this Tribunal can, and should, summarily dismiss Claimants' "full protection and security" argument.

In its Memorial, Loewen glosses over this difficulty. Loewen asserts instead that two international cases stand for the proposition that the duty of "full protection and security" imposes "an even heightened affirmative duty of ca[r]e." (citing *Asian Agricultural Products Ltd. v. Sri Lanka* ("AAPL"), 30 I.L.M. 577 (1991) and *Case Concerning Elettronica Sicala S.P.A.* ("ELSI")

(United States v. Italy), 1989 I.C.J. 15 (July 20)). Neither case supports Loewen's contention.

Loewen simply misconstrues *AAPL*. That tribunal *rejected* the argument that the phrase "shall enjoy full protection and security" imposed strict liability on the host government. 30 I.L.M. at 599–602. Looking at "both the oldest reported arbitral precedent and the latest I.C.J. ruling [*i.e.*, the *ELSI* case]," the tribunal reaffirmed that "the language imposing on the host State an obligation to provide 'protection and security' or 'full protection and security required by international law' . . . could not be construed according to the natural and ordinary sense of the words as creating a 'strict liability,'" and that the due diligence standard remained the operative one. *Id.* at 600–01. To be sure, the tribunal did write the sentence that Loewen quotes: "the addition of words like 'constant' or 'full' to strengthen the required standard of 'protection and security' could justifiably indicate the Parties' intention to require within their treaty relationship a standard of 'due diligence' higher than the 'minimum standard' of general international law." *Id.* at 601. However, the tribunal wrote that sentence for the purpose of rejecting the proposition it contains. In the very next sentence the tribunal stated: "But, the nature of both the obligation and ensuing responsibility remain unchanged, since the added words 'constant' or 'full' are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a 'strict liability.'" *Id.* Moreover, in *AAPL*, the treaty provision guaranteeing full protection and security, unlike Article 1105(1), did not expressly restrict its coverage to protection in accordance with international law. *Id.* at 633. In short, *AAPL* does not support Loewen's assertion that the word "full" alone evidences an intent of the NAFTA Parties to obligate themselves to provide protection and security that exceeds, or otherwise is different from, that required under customary international law.

*ELSI*—one of the cases that the *AAPL* tribunal consulted—is even clearer on this point. In *ELSI*, the parties disputed the meaning of an article of a treaty of friendship, commerce and navigation which provided: "The nationals of each High Contracting Party shall receive . . . the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law." 1989

I.C.J. at 63. Noting that the “primary standard laid down by Article V is ‘the full protection and security required by international law,’” the ICJ held: “in short the ‘protection and security’ must conform to the minimum international standard.” *Id.* at 66. Thus, in *ELSI*, the ICJ confirmed that, by obligating themselves to provide “full” protection and security, the State Parties had not intended to require a level of protection and security in excess of the international minimum standard.

Neither is there support for claimants’ suggestion that, even under the minimum standard, “[t]he requirement to provide ‘full protection and security’ obligates a government to prevent economic injury inflicted by private parties.” As noted above, cases in which the customary international law obligation of full protection and security was found to have been breached are limited to those in which a State failed to provide reasonable police protection against acts of a criminal nature that physically invaded the person or property of an alien. Loewen cites no case, and the United States is aware of none, where an international tribunal held that the obligation to provide “full protection and security” extends beyond physical protection and security for individuals and tangible property against criminal activity. *Cf.* Kenneth J. Vandavelde, *Investment Liberalization and Economic Development: The Role of Bilateral Investment Treaties*, 36 Colum. J. Transnat’l L., 501, 510 n.28 (1998) (“It does not appear . . . that any BIT party thus far has claimed that a host state’s failure to protect intellectual property rights violated” the full protection and security obligation.).

Indeed, if the full protection and security requirement were to extend to an obligation “to prevent economic injury inflicted by private parties,” NAFTA Article 1105(1) would constitute a very substantial enlargement of that obligation as it has been recognized under customary international law. As Umpire Ralston stated in *Sambiaggio*, 10 R.I.A.A. 499, 521 (Mixed Italy-Venez. Comm’n of 1903), if the governments intended to depart from the general principles of international law, then the “agreement would naturally have found direct expression in the protocol itself and would not have been left to doubtful interpretation.” Likewise, in *AAPL*, in rejecting the claimant’s construction of “full protection and security” in a bilateral investment treaty, the tribunal stated:

proper interpretation has to take into account the realization of the Treaty's general spirit and objectives, which is clearly in the present case the encouragement of investments through securing an adequate environment of legal protection. But, in the absence of travaux préparatoires in the proper sense, it would be almost impossible to ascertain whether Sri Lanka and the United Kingdom had contemplated during their negotiations the necessity of disregarding the common habitual pattern adopted by previous treaties, and to establish a "strict liability" in favour of the foreign investor as one of the objectives of their treaty protection. Equally, none among the authors referred to by the Parties claimed in his commentary that the Sri Lanka/U.K. Treaty or similar Bilateral Investment Treaties had the effect of increasing the customary international law standards of protection to the extent of imposing "strict liability" on the host State in cases where the investment suffers losses due to property destruction.

50 I.L.M. at 601. For similar reasons, this Tribunal should reject Claimants' invitation to construe the duty of "full protection and security" to extend beyond the minimum standard under customary international law.

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U.S. Rejoinder, August 27, 2001

*1. The Availability Of Further Appeals Defeats Claimants' Article 1105 Claim As A Matter Of Law*

The United States has shown that the substantive obligations of customary international law, as incorporated in NAFTA Article 1105, cannot be breached by decisions of domestic courts from which effective appeals were available. The United States also has shown that this is so regardless of whether the local remedies rule has been waived. Claimants and at least one of their experts continue to disagree, charging that the United States is "simply making . . . up" this substantive principle of state responsibility.

. . . [I]t is now a well-established part of State practice that a lower court decision from which an effective appeal is available cannot constitute a denial of justice, irrespective of the local remedies rule. As the United States explained in its comments on the most recent ILC Draft Articles on State Responsibility,

[t]he lower court decision, in and of itself, may be attributable to the State pursuant to article 4 [of the ILC Draft]; whether it constitutes, in and of itself, an internationally wrongful act is a separate question, as recognized in article 2. Except in extraordinary circumstances, there is no question of breach of an international obligation until the lower court decision becomes the final expression of the court system as a whole, i.e. until there has been a decision of the court of last resort available in the case.

The United States is hardly alone in this view. For example, in its 1998 comments to the ILC Draft Articles on State Responsibility, the United Kingdom observed that “the duty to provide a fair and efficient system of justice” is not breached by a lower court from which an effective appeal was available: “*Corruption in an inferior court would not violate that obligation if redress were speedily available in a higher court.*” The United Kingdom emphasized that this substantive principle of state responsibility, which requires exhaustion of all “speedily available” appeals before a denial of justice could be found, “should be clearly distinguished” from the local remedies rule, which is strictly procedural in character.

As Professor Greenwood notes, this comment of the United Kingdom, which is fully consistent with the view of the United States,

is directly in point in the present case. It constitutes State practice, only three years old, which clearly indicates that the substantive obligation imposed on the State is to provide a fair and efficient *system* of justice and that the decision of a lower court (even if it is not merely wrong but “corrupt”) does not put the State in breach of that obligation if the State has provided the means within that system whereby that decision can be corrected.

Second Greenwood Op. at ¶ 83. The comment also confirms that the requirement of exhaustion of appeals in this context is not in any way an aspect of the local remedies rule, but is instead a substantive element of any claim for a breach of the obligation.

In view of these and other authorities to the same effect (*see* Second Greenwood Op. at ¶¶ 82–88), claimants' charge that the United States is "simply making it up" is ironic, for it is claimants, not the United States, who are without legal basis for their position. As Professor Greenwood observes, "neither Sir Robert nor Sir Ian has produced a single instance of an arbitral decision given by any international tribunal in which a State has been held responsible for the decision of a lower court when there was available within the legal system of that State a means by which that decision could effectively be challenged." Second Greenwood Op. at ¶ 89.

In fact, despite the professed agreement of claimants' experts, it appears that even Sir Ian does not support the view expressed by claimants and Sir Robert in this regard. Notwithstanding the tenor of his opinion, Sir Ian does not dispute the general point that, "[s]o long as the system itself provides a sufficient guarantee of such treatment [in accordance with the customary international minimum standard], the State will not be in violation of its international obligation merely because a trial court gives a defective decision which can be corrected on appeal." Sinclair Op. at 33 (quoting Professor Greenwood). Sir Ian's response is not that the point is incorrect, but only that there has been a "failure of the system" where, in a given case, the claimant has no reasonable means of challenging the defective decision—in other words, where an appeal would be futile. *Id.* This, of course, is precisely the United States' point: because Loewen's means of appeal were not manifestly ineffective or obviously futile, the Mississippi judgments cannot be said to have constituted a denial of justice.

Although claimants contend that this Tribunal has already "foreclosed" consideration of this issue in its interim decision on competence, the United States does not believe that this is so, as the Tribunal has thus far addressed only the admissibility of the claims, not their merits (and, even then, did not decide the issue of admissibility but joined it to the merits). As Professor Greenwood notes, "the decision which Loewen asserts the Tribunal took would clearly have been wrong in international law." Second

Greenwood Op. at ¶ 57. The Tribunal should thus reject claimants' invitation to err on the merits of this claim by "hold[ing]—*for the first time*—that a State is in breach of its treaty obligations as the result of a court decision which is open to challenge," for there is "nothing in th[e] terms [of NAFTA Article 1105] to suggest a departure from a practice which was already firmly grounded both in authority and common sense." *Id.* at ¶ 91 (emphasis added).

## 2. Claimants Misstate The Liability Standard Under Article 1105

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The Free Trade Commission's interpretation confirms that "Article 1105(1) prescribes the *customary international law minimum standard of treatment of aliens* as the minimum standard of treatment to be afforded to investments of investors of another Party." FTC Interpretation of July 31, 2001 at ¶ B(1) (emphasis added). Contrary to claimants' interpretation, "[t]he concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens." *Id.* at ¶ B(2). The Free Trade Commission's interpretation, which is binding on this and other NAFTA Chapter Eleven tribunals (*see* NAFTA art. 1131(2)), thus confirms that, contrary to claimants' contention, treatment in accordance with the customary international law minimum standard is not merely "*one* of the protections afforded to investments under NAFTA Article 1105", but it is the *only* protection afforded by Article 1105(1).

Claimants appear to concede that the customary international minimum standard, as applicable to the circumstances of this case, is the "denial of justice" standard. They argue, however, that the standard for a "denial of justice" is not so "extreme" as the United States contends, suggesting that denials of justice arising out of domestic judicial proceedings are even "frequent" or "common" occurrences. (quoting Freeman, *International Responsibility of States for Denial of Justice* 71–72 (1938), and Charles C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States* 731–32 (2d ed. 1945)). . . .

In fact, even claimants' own international law experts do not support claimants in this contention. To the contrary, Sir Robert Jennings acknowledges that "the cases show that generally speaking it has been applied when the treatment of an alien has been outrageous and so without any doubt a breach of a minimum standard." First Jennings Op. at 17. *See also* Third Jennings Opinion at 27 (assuming that "the traditional minimum standard" requires a showing of "outrageous treatment"); *id.* (even if Article 1105 were not limited to the customary international law minimum, "[i]t may . . . readily be agreed that no court or tribunal will lightly or readily find the judicial acts of a respondent State in breach of the requirements of international law."). Claimants' other sources confirm that a charge of denial of justice is an extreme one that is met only in the rarest of circumstances.

As Professor Greenwood explains, "[c]ontrary to what is said by Loewen, international law sets a high threshold in this respect, recognizing a considerable 'margin of appreciation' on the part of national courts. Thus, the awards and texts make clear that error on the part of the national court is not enough, what is required is 'manifest injustice' or 'gross unfairness' . . . 'flagrant and inexcusable violation' . . . or 'palpable violation' in which 'bad faith not judicial error seems to be the heart of the matter.'" Second Greenwood Op. at ¶ 94 (citations omitted). Where the judicial action in question was mere error, it is not enough that the error had extreme consequences for the claimant, because "judicial error, *whatever the result of the decision*, does not give rise to international responsibility on the part of the State." Revised Draft on International Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens, Article 3(3), *reprinted in* García-Amador, *Recent Codification of the Law of State Responsibility for Injuries to Aliens* 129, 130 (emphasis added).

In short, contrary to claimants' unsupported assertions, the customary international minimum standard applicable to this case is every bit as "extreme" as the United States has indicated. As Judge Tanaka of the International Court of Justice explained in the *Barcelona Traction* case,

[i]t is an extremely serious matter to make a charge of a denial of justice vis-a-vis a State. It involves not only the



imputation of a lower international standard to the judiciary of the State concerned but a moral condemnation of that judiciary. As a result, the allegation of a denial of justice is considered to be a grave charge which States are not inclined to make if some other formulation is possible.

1970 I.C.J. at 160 (separate opinion of Judge Tanaka).

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### **U.S. Response to 1128 Submissions, December 7, 2001**

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In its written memorials, and at oral argument, the United States has shown that a State is not liable under customary international law for an action of its courts unless it is a final action of the judicial system as a whole. . . . This sound principle respects the independence and integrity of a State's judicial institutions, which are accorded special deference under international law. Furthermore, it inherently limits the vast number of lower court decisions that could otherwise form the basis for international claims in regimes like the NAFTA. Thus, a decision by an inferior court that is subject to appeal is not a "measure adopted or maintained" by a NAFTA Party and cannot be a breach under Chapter 11 of the NAFTA.

We note that, in its Article 1128 Submission, Mexico joins the United States in this understanding of customary international law. Mexico states that it "agrees with the view of the United States that the operation of the legal system as a whole, not only the act of the inferior court in the instant case, must be examined before it can be said to be in breach of its international obligations."

The United States also showed that, contrary to the suggestion made at the hearing by the Claimants, neither the *Azinian* case nor the *Metalclad* case supports an argument that non-final court decisions are measures adopted or maintained by a NAFTA Party. In its Article 1128 Submission, Mexico, which was the Respondent in both cases, confirms this fact. With regard to *Azinian*, Mexico confirms that administrative action by the municipality, not action by Mexican courts, was the basis for

the investors' NAFTA claim. Mexico also confirms that the court decisions to which the *Azinian* tribunal referred in *obiter dicta* were, in any event, final decisions from which no appeal would have been possible. See *id.*; *Azinian v. United Mexican States* (Nov.1, 1999) (Award) ¶¶ 96–100.

Similarly, with regard to *Metalclad*, Mexico's 1128 Submission confirms that the basis of the *Metalclad* award was administrative action, not court action. Moreover, as the United States explained at the hearing, the injunction to which the *Metalclad* Tribunal referred, and which the Claimants cited at the hearing as indicating that court action was the basis for the expropriation finding in that case, was issued in a court case brought by the municipality against the federal government to prevent implementation of an agreement entered into by Metalclad's subsidiary and the federal government. Neither the issuance of the injunction nor any other court decision was cited by the tribunal as a basis for its award. Moreover, as the United States also explained at the hearing, the court decision embodied in the injunction was, in any event, final with respect to Metalclad and its subsidiary. Thus, like *Azinian*, the *Metalclad* case is irrelevant to the issue of finality.

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### 3. Claims against Mexico

#### ***Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States***

In July 2001, an ICSID tribunal held a hearing on the merits in *Marvin Roy Feldman Karpa (CEMSA) v. United Mexican States*, ICSID Case No. ARB (AF)/99/1. Mr. Feldman, a U.S. citizen, submitted claims on behalf of CEMSA against Mexico under the ICSID Arbitration (Additional Facility) Rules. Feldman asserted that CEMSA, a registered foreign trading company and exporter of cigarettes from Mexico since 1990, was denied the benefits of a law that allowed certain tax refunds to exporters. Feldman claimed expropriation under NAFTA Article 1110 based on Mexico's alleged refusal (1) to implement a 1993 Mexican Supreme Court decision in CEMSA's favor ordering a refund of taxes paid, and (2) to refund taxes

on cigarettes CEMSA exported in 1997. Feldman claimed approximately US\$40 million in damages. Prior to Feldman's claims being submitted to arbitration, the United States and Mexico agreed pursuant to NAFTA Article 2103 (which governs taxation measures) that one of Feldman's claims, which was based on certain Mexican tax legislation, could not be pursued.

Excerpts below from a submission under Article 1128 filed by the United States on October 6, 2000 addressed the question of whether a natural person who is both a citizen of the United States and a permanent resident—but not a citizen—of Mexico has standing to submit a claim against Mexico under Chapter Eleven of the NAFTA. In December 2000, the tribunal issued an interim decision on preliminary jurisdictional issues in the case. 40 I.L.M. 615 (2001). This decision, which addressed the issue of nationality, adopted the U.S. position. The Tribunal held:

36. Under [our] interpretation . . . , which concurs with general principles of international law . . . , the Claimant in this case, being a citizen of the United States and of the United States only, and despite his permanent residence (immigrado status) in Mexico, has standing to sue in the present arbitration under Chapter Eleven of NAFTA. Indeed, the Claimant as a citizen of the United States should not be barred from the protection provided by Chapter Eleven just because he is also a permanent resident of Mexico.

The Tribunal has not yet issued an award on the merits.

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**STANDING UNDER ARTICLE 1117(1)**

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4. The NAFTA provision that governs the question of a claimant's standing to bring a claim on behalf of an enterprise under Chapter Eleven states in relevant part that "[a]n investor of a Party, on behalf of an enterprise of another Party . . . may

submit to arbitration under [Section B] a claim that the other Party has breached an obligation under . . . Section A. . . .” NAFTA art. 1117(1); *see also id.* art. 1116(1). Accordingly, Article 1117(1) *affirmatively grants* the right to submit a claim to arbitration to (1) an “investor of a Party,” (2) on behalf of an “enterprise of another Party,” (3) as to which such other Party breached an obligation under Section A.

5. Article 1139 of the NAFTA defines the term “investor of a Party” to include a natural person who is “a national . . . of such Party that seeks to make, is making or has made an investment.” NAFTA art. 1139. Article 201 of the NAFTA defines the term “national” as “a natural person who is a citizen or permanent resident of a Party and any other natural person referred to in Annex 201.1.” *Id.* art. 201. Read together, and by their ordinary meaning, these express terms of the NAFTA provide that a citizen or permanent resident of a Party (*e.g.*, the United States) “may submit” a claim to arbitration on behalf of an eligible enterprise of another Party (*e.g.*, Mexico) alleging such other Party breached a NAFTA obligation.

6. No provision in Chapter Eleven, or anywhere else in the NAFTA, restricts the right set forth under Article 1117 to a limited subset of “investors of a Party.” In particular, no provision of Chapter Eleven *expressly prohibits* a natural person who is both a citizen of the United States and a permanent resident of Mexico from submitting a claim against Mexico under Article 1117, where all the other conditions of that provision are also met. Thus, the NAFTA does not by its terms bar a claim against Mexico under Chapter Eleven by a natural person who is a citizen of the United States just because that natural person is also a permanent resident of Mexico.

7. The argument has been made that the claimant nevertheless lacks standing under rules of customary international law applicable to this case. The United States notes that the NAFTA does indeed direct the Tribunal to decide disputed issues not only in accordance with the treaty itself, but also in accordance with “applicable rules of international law.” NAFTA art. 1131(1). The United States, however, disagrees that any such rules bar this claim.

8. To begin, the United States accepts that the rule set forth in *United States ex rel. Mergé v. Italian Republic*, and adopted by *Iran v. United States*, Case No. A/18, provides a rule of decision that

governs Chapter Eleven tribunals by virtue of Article 1131(1). *See Mergé Case* (Italian-U.S. Claims Commission) 14 R.I.A.A. 236 (1955); *Case No. A/18*, 5 IRAN-U.S. CL. TRIBUNAL REP. 251 (1984). This rule in effect states that the principle of “non-responsibility” must yield to the principle of “dominant and effective” citizenship when the claim is brought by or on behalf of a dual citizen whose “dominant and effective” citizenship is not that of the defending State. In other words, a State is not responsible for a claim asserted against it by one of its own citizens, unless the claimant is a dual citizen whose dominant and effective citizenship is that of the other State.

9. The rule only applies, however, to cases of “dual nationality” as understood under customary international law, *i.e.*, where a natural person has acquired the citizenship of two States. *See* 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW § 8, at 65 (1967) (“A person who is claimed as a subject or citizen by two states is said to possess dual nationality.”). Thus, notwithstanding the use in NAFTA of the word “national” to include permanent residents, under customary international law, nationality is, in all respects relevant here, synonymous with citizenship and thus excludes mere permanent residents. *See* 1 L. OPPENHEIM, INTERNATIONAL LAW § 293, 642–43 (8th ed. 1995) (“Nationality of an individual is his quality of being a subject of a certain State, and therefore its citizen.”). Furthermore, customary international law looks to a State’s municipal law to define who may be considered a citizen in any given situation. *See* WHITEMAN § 7, at 48; OPPENHEIM § 293, at 643. In this case, of course, there is no suggestion that the claimant has acquired Mexican citizenship under the municipal law of Mexico. Thus, the NAFTA’s choice of terminology does not mean that permanent residents of one Party are now to be considered “nationals” of that Party for purposes of customary international law generally.

10. Nothing in the NAFTA suggests that the Parties intended to alter the customary international law principle of non-responsibility. Therefore, pursuant to Article 1131(1), that principle must be applied with reference to the customary international law meaning of citizenship according to which the principle was developed, not with reference to the term “national” in the NAFTA. Accordingly, the non-responsibility principle does not apply to, let alone bar, a claim brought against Mexico under Chapter

Eleven by a natural person who is both a citizen of the United States and a permanent resident (but not a citizen) of Mexico, because such a person does not have the “dual nationality” required for the principle to operate.

11. It follows that the principle of dominant and effective citizenship is also inapplicable in this case. The application of this rule is limited to cases of “dual nationality” as understood under customary international law, because it applies to defeat the principle of non-responsibility of States for claims of certain dual citizens. *See Mergé Case*, 14 R.I.A.A. at part V, para. 5; *Case A/18*, 5 IRAN-U.S. CL. TRIBUNAL REP. at 264–66. Likewise, even though the *Nottebohm Case* did not involve a dual citizen, its analysis of whether an espousing State’s ties to a purported citizen were sufficiently close to be cognizable in international law is inapposite where, as here, there is no dispute regarding the genuineness or international effect of the claimant’s claimed citizenship. *See generally Nottebohm Case* (Liechtenstein v. Guatemala), 1955 I.C.J. 4, 21–26 (April 6) (Judgment).

12. In sum, the United States submits that, under applicable rules of international law, a State Party to the NAFTA is not responsible for a claim asserted against it under Chapter Eleven by an investor of another Party possessing the nationality of both State Parties—as determined by each Party’s municipal law, not by Article 201 of the NAFTA—unless such individual’s dominant and effective citizenship is that of the other Party. But where the claimant is not a citizen of the disputing Party, neither the NAFTA nor the principle of non-responsibility bars the claim, nor does the principle of dominant and effective citizenship apply.

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## D. WORLD TRADE ORGANIZATION

### 1. Doha Ministerial Declaration

The United States was an active participant in the successful Fourth Ministerial Conference of the World Trade Organization in Doha, Qatar. On November 14, 2001 the Conference adopted a Declaration launching new global trade negotiations and a work program, a Declaration on Intellectual Property Protection (TRIPS) and Access to Medicines

and Public Health and a Decision on Implementation-Related Issues and Concerns Raised by Developing Countries. In a statement released on November 14 in Doha, United States Trade Representative Robert B. Zoellick welcomed the developments as evidencing a choice by the world of a “path of hope, openness, development and growth.” Excerpts from his statement are provided below.

The full text of his remarks is available at <http://usinfo.state.gov/topical/econ/wto/wwwwh01111501.html>.

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We’ve reached an agreement that affirms the commitment of 142 WTO members to work cooperatively to reduce the world’s trade barriers. This signal of forward progress on trade gives an endorsement and very timely boost to the multilateral trading system. This is only a beginning of course, and over the next few years we will certainly face more tests as we engage in negotiations. But I’m optimistic that what we’ve achieved in Doha lays the ground work for a trade liberalization agenda that will be a starting point for greater development, growth, opportunity and openness around the world. Particularly in the aftermath of September 11 it is also an excellent political signal that 142 diverse nations can come together to agree on a constructive agenda for the world’s public.

Launching the negotiations with this declaration is a landmark achievement for U.S. agriculture. Our team really delivered for America’s farmers and ranchers. We’ve settled on a program that lays out ambitious objectives for future negotiations on the liberalization of the agriculture market. These objectives represent a cornerstone of our market access priorities for trade and they will create a framework that will help the United States and others to advance a fundamental agricultural reform agenda.

Our work here can mark a new era in economic cooperation between developing and developed nations. On a range of issues, such as agricultural liberalization and reduction of tariffs on non-agricultural goods, we’ve shown how our interests can converge with the developing world. I believe that we in the United States have an enhanced appreciation for the interests of developing

nations in trade. And in turn many of the developing nations with which we cooperated have demonstrated their recognition of our shared interests.

The adoption of the landmark political declaration on the TRIPS Agreement and public health is a good example of developed and developing nations advancing common goals by working through issues together. I believe this declaration highlights that we have provisions in the TRIPS agreement that provide members with the flexibility to address public health emergencies, like HIV/AIDS and tuberculosis and malaria. And it also recognizes the importance of intellectual property protection for the development of new lifesaving medicines.

We were pleased with the outcome of this process—particularly our work with Brazil and a number of African nations. Through the declaration more than 140 members of the WTO members have expressed their strong support for the TRIPS Agreement and we believe this declaration affirms that TRIPS and the global trading system can help countries address pressing public health problems.

In the area of rules, the text provides for a two-phase process of negotiations to clarify and improve the disciplines under the Agreements on Anti-dumping and Countervailing Measures, and on trade distorting practices that give rise to dumping and countervailing duties. The text notes that the negotiations should preserve the effectiveness of the Agreements and the instruments that we apply, thus recognizing that these instruments are legitimate means to counter unfair trade practices and should not be undermined.

In services, the declaration sets the stage for the commencement of negotiations on new liberalization commitments, in sectors including telecommunications, financial services, energy, audio visual, and express delivery. These negotiations will help promote America's long-term economic growth as the service sector now constitutes 62 percent of our economy.

On environment, we have a number of excellent results. We have agreed to negotiate disciplines on fisheries subsidies as the World Wildlife Fund and a number of NGOs [nongovernmental organizations] urged us to do. We have, for the first time, an agreement that calls for negotiations on the relationship between the



WTO rules and the specific trade-related obligations of members of certain multilateral environmental agreements (MEAs). We ensured, through multiple safeguards, that others will not be able to use the MEAs as tools to restrict U.S. trade. And we will negotiate to remove the barriers to environmental goods and services, a true win-win process.

Combined with other commitments in the declaration, including support for national environmental reviews, we will be simultaneously encouraging trade liberalization and environmental protection through the recognition that the two are mutually reinforcing. We also are taking important steps to improve the transparency of the WTO.

This week's accession of the People's Republic of China and Taiwan to the WTO represents a very historic achievement. It brings China into the rules-based trading system and will open its market to U.S. goods and services. For Taiwan the accession is a recognition of the great strides made by its people over the last two decades as they have been able to both establish a thriving democracy and transform their market from a developing economy to a trade and economic powerhouse that has joined the WTO as a developed economy.

## **2. US-EU Banana Dispute**

On April 11, 2001, the United States Government and the European Commission reached agreement to resolve a long-standing dispute over trade in bananas. An EU-wide regulation of banana imports into the European market was first established in 1993 and was designed in part to benefit developing countries in Africa, the Caribbean and the Pacific ("ACP" countries), many of whom were former European colonies. In 1994 two American companies, Chiquita Brands International and the Hawaii Banana Industry Association, filed a petition under § 302(a) of the 1974 Trade Act challenging the EU treatment of bananas on the grounds that it was discriminatory and reduced US companies' share of the EU market by more than 50%. In 1995, after failing to negotiate a settlement with the EU, the United States, Guatemala, Honduras and Mexico initiated action with the WTO, in which

Ecuador also joined in 1996. A WTO panel report in 1997 found that the EU treatment of bananas was discriminatory and therefore inconsistent with the GATT and the General Agreement on Trade in Services ("GATS"), a decision that was upheld by the Appellate Body. On April 19, 1999, the WTO found a modified banana regulatory regime adopted by the EU in January 1998 was also incompatible with GATT and GATS, and authorized the United States to impose retaliatory duties. The United States did so immediately, effective retroactively to March 3, 1999. The duties remained in effect until suspended on July 1, 2001, in accordance with the April Agreement. A Joint United States-European Union Press Release of April 11, 2001 describing the agreement is set forth below.

The full text is available at [www.ustr.gov/releases/2001/04/01-23.html](http://www.ustr.gov/releases/2001/04/01-23.html).

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Welcoming the agreement, European Commissioner for Trade Pascal Lamy, European Commissioner for Agriculture Franz Fischler, U.S. Trade Representative Robert B. Zoellick, and U.S. Secretary of Commerce Don Evans stated:

"Today's step marks a significant breakthrough. It demonstrates the commitment of the Bush Administration and the European Commission to work together closely and effectively on trade issues. The banana disputes of the past nine years have been disruptive for all the parties involved—traders, Latin American, African, and Caribbean producers, and consumers. We are confident that today's agreement will end the past friction and move us toward a better basis for the banana trade."

Both parties recognized that they had shared objectives: to reach agreement on a WTO-compliant system, to ensure fair and satisfactory access to the European market for bananas from all origins and all operators, and to protect the vulnerable African Caribbean Pacific (ACP) producers. Most important, both parties agreed the time had come to end a dispute which had led to prolonged conflict in the world trading system.

The new system is scheduled to take effect on July 1, 2001. The European Union will institute a system of licensing, based on historic reference periods from July 1, 2001. The European Commission will also initiate the necessary procedures to propose to the Council of Ministers an adjustment of the quantities in the various quotas, in order to expand access for Latin American bananas and to secure a marketshare for a specific quantity of bananas of ACP origin. The United States has pledged to work actively to secure acceptance of the EU's request for the necessary WTO authorization. Once these steps have been completed, the sanctions will be definitively lifted.

A tariff-only system is scheduled to take effect on January 1, 2006. The European Union will begin negotiations necessary under WTO rules in time to introduce the tariff-only system from January 1, 2006.

The European Commission will now table the necessary proposals to the Council of Ministers and the European Parliament in order to fully implement the agreement as soon as possible.

### **3. Accession of People's Republic of China and Taiwan to the WTO Agreement**

The United States welcomed the decision of trade ministers attending the World Trade Organization ("WTO") Ministerial in Doha to admit the People's Republic of China ("China" or "PRC") and Taiwan as new members of the WTO in statements by Robert B. Zoellick, U.S. Special Trade Representative, on November 11, 2001, available at [www.ustr.gov/releases/2001/11/01-98.htm](http://www.ustr.gov/releases/2001/11/01-98.htm).

On November 9, 2001, pursuant to § 101(b) of Public Law 106-286, 114 Stat. 881, President Bush transmitted a report to Congress certifying that the terms and conditions for the accession of PRC to the WTO were at least equivalent to those agreed between the United States and China in November 1999 for such accession by China. On December 27, 2001, following China's December 11, 2001, acceptance into membership of the WTO, President Bush issued a proclamation providing for normal trade relations

treatment between the United States and China, effective January 1, 2002. The proclamation is set forth below.

President Bush's proclamation and accompanying fact sheet are available at <http://www.whitehouse.gov/news/releases/2001/12/20011227-1.html>.

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## To Extend Nondiscriminatory Treatment to the Products of the People's Republic of China by the President of the United States of America

### A Proclamation

1. The United States and the People's Republic of China (China) opened trade relations in 1980. Since that time, the products of China have received nondiscriminatory treatment pursuant to annual waivers of the requirements of section 402 of the Trade Act of 1974 (the "Trade Act") (19 U.S.C. 2432). Trade between the United States and China has expanded significantly even though China has maintained restrictions on market access for U.S. exports and investment.

2. On November 15, 1999, the United States and China agreed on certain terms and conditions for China's accession to the World Trade Organization (WTO) that when implemented will eliminate or greatly reduce the principal barriers to trade and investment in China.

3. On November 9, 2001, pursuant to section 101(b) of Public Law 106-286, 114 Stat. 881, I transmitted a report to the Congress certifying that the terms and conditions for the accession of China to the WTO are at least equivalent to those agreed between the United States and China on November 15, 1999. On November 10, 2001, the Ministerial Conference of the WTO approved the terms and conditions for China's accession and invited China to become a member of the WTO. China has accepted these terms and conditions and became a WTO member on December 11, 2001.

4. Pursuant to section 101(a)(1) of Public Law 106-286, 114 Stat. 881, I hereby determine that chapter 1 of title IV of the Trade Act should no longer apply to China.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, acting under the authority vested in me by the Constitution and the laws of the United States, including but not limited to sections 101(a)(2) and 102(a) of Public Law 106–286, 114 Stat. 881, do hereby proclaim that:

(1) Nondiscriminatory treatment (normal trade relations treatment) shall be extended to the products of China; and

(2) The extension of nondiscriminatory treatment to the products of China shall be effective as of January 1, 2002.

\* \* \* \*

#### **4. Foreign Sales Corporation Dispute**

On March 20, 2000 the WTO Dispute Settlement Body adopted rulings by a dispute settlement panel and the WTO Appellate Body finding the Foreign Sales Corporation (“FSC”) provisions of U.S. tax law to be an export subsidy inconsistent with WTO obligations. To comply with these rulings, the United States enacted the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (“ETI Act”), signed into law November 15, 2000. On November 17, 2000, the EU instituted a WTO dispute alleging that the ETI Act failed to eliminate the deficiencies in the FSC provisions. On the same day, the EU also requested authority from the WTO to impose trade sanctions on \$4.043 billion worth of U.S. exports, equivalent to the amount of the export subsidy estimated by the EU. On November 27, 2000, the United States initiated a WTO arbitration proceeding, alleging that the amount of sanctions requested by the EU was excessive under WTO standards. This arbitration was suspended pending the outcome of the EU’s challenge to the ETI Act itself. In a hearing before the WTO Appellate Body on November 26, 2001, the United States provided its views on the consistency of the ETI Act with its WTO obligations.

The full text is available at [www.state.gov/s/l](http://www.state.gov/s/l).

## I. INTRODUCTION

1.1. Mr. Chairman and Members of the Division, this case is extraordinarily important to the United States and to the world economy. Few things are as central to a country's sovereignty as how it raises revenue. As the Appellate Body has said, the WTO rules do not "compel Members to choose a particular kind of tax system."

1.2. Although the Panel in this case acknowledged this fundamental principle, the Panel failed to uphold it. The necessary implication of the Panel's analysis is that the WTO may second-guess the reasonableness of a Member's decisions regarding the most basic elements of its tax *system*. However, it is not the role of the WTO to substitute its judgment for the judgment of a Member's own lawmakers in this regard.

1.3. The Panel would require the United States to tax foreign income that a territorial tax system is seemingly allowed *not* to tax. Not only would this usurp the freedom of choice recognized by this Appellate Body, it would contravene the underlying principle of neutrality and deny the most basic international parity. If the Panel Report stands, the only way the United States could maintain parity with the tax systems of other countries would be through comprehensive reform—by scrapping our entire tax system and starting over.

1.4. But even that might not be enough. The Panel Report includes so many newly-created rules—mostly vague and subjective and sometimes contradictory—that it is impossible to know what type of tax system would be acceptable. Whatever rules ultimately govern this case must be workable and clear. Legislators cannot develop clear rules to implement a WTO decision if that decision is not *itself* grounded in clear rules.

1.5. The analysis of the Panel in this case places at risk tax systems throughout Europe and around the world. For example, the broad and subjective approach employed by the Panel in addressing the issue of measures to avoid double tax—which is an issue of first impression—calls into question measures incorporated in the tax systems of every Member.

1.6. If the Panel Report were allowed to stand, the world trading system would be faced with a continuation of the stale-

mate first created by the 1976 Tax Legislation Cases. What ensued from those cases was a “Thirty Years War” that will continue to rage if the Appellate Body does not step in and confirm that Members are indeed free to establish and rely on their individual normative tax systems.

1.7. The Panel Report is *not* faithful either to the text of the controlling agreements or to the holdings of this Appellate Body. It should be reversed, for reasons that Mr. Jones will now urge. The Appellate Body must ensure that this long-standing dispute is resolved through rules and standards that are clear, practical, and that respect the sovereignty of all WTO Members to structure their own tax systems and maintain tax parity. Anything less would only lead to further disagreement and dispute.

## II. ARGUMENT: NO SUBSIDY IS CREATED BY THE ETI

2.1. The principal question before us is whether the United States has provided a prohibited export subsidy under Article 3.1(a) of the SCM Agreement. The term “subsidy” is defined for this purpose in Article 1.1 to mean foregoing the collection of taxes “otherwise due.” As the Appellate Body has stated, to determine whether taxes are “otherwise due” requires us to evaluate whether the challenged tax provision departs from the “normative benchmark” of the Nation’s taxing system.

2.2. The Panel failed to conduct this required analysis. Instead, the Panel simply reasoned that any exclusion from gross income has the character of a subsidy because, in the absence of the exclusion, the income would “otherwise” be subject to tax. The Panel concluded that, because there is no *express* exclusion for extraterritorial income in the U.S. system in the absence of the challenged provision, the exclusion *must* be a “subsidy”—for it allows a reduction of taxes “otherwise due.”

2.3. The Panel’s simplistic reasoning is clearly flawed. It fails to recognize that a Nation’s “normative benchmark” of taxation is often expressed in the deductions and exclusions that it allows *as well as* in the provisions that impose the tax. That is to say, in determining the “normative benchmark” of taxation, you must look both at what *is* taxed and what is *not* taxed. An income tax is, by defi-

nition, a tax on *net* income, not on *gross* income. Viewed from this proper perspective, the ETI exclusion is clearly consistent with, and a part of, the normative tax system of the United States.

2.4. It is helpful at the outset to clarify how our normative tax system works. Our tax system has been described as a “world-wide” system of taxation, which nominally would reach the income of a U.S. corporation wherever earned. Under that system, however, the United States has *always* allowed U.S. taxpayers who make foreign sales of goods to structure their affairs in a manner that allocates the domestic portion of their income to the United States and the foreign portion abroad. The traditional method for structuring such transactions in the U.S. system has been to make these sales through a foreign-incorporated subsidiary. In that situation, only the portion of the income recognized as domestic is then taxed to the U.S. entity; the portion that is recognized as foreign is not taxed by the U.S.

2.5. In this respect, our system is analogous to the standard “territorial” model, which allows domestic taxpayers to locate a portion of their profits abroad simply by forming a “permanent establishment” in a foreign country. While a “permanent establishment” sounds like a bricks and mortar facility, it may be simply the foreign location of a sales agent for the domestic company, as the OECD commentary makes clear.

2.6. In enacting the ETI, the United States (i) preserved its longstanding “normative” system of allowing resident taxpayers to structure their transactions to locate abroad the foreign-allocated portion of their foreign sales income (ii) but did so in a *direct* fashion that no longer requires the formation of a foreign subsidiary to make foreign sales. Instead, in a fashion analogous to the permanent establishment requirement of other Nations, the ETI requires that foreign sales be solicited, negotiated or contracted by a U.S. taxpayer abroad. And, when the statutory requirements for foreign activities are satisfied, the ETI makes a direct allocation of the sales income between the domestic and foreign portion and imposes a tax in the United States only on the domestic portion.

2.7. The operation of our normative system, and of the ETI, must be understood in the context of other related provisions of our very complicated tax structure. As early as 1962, the United States became concerned that our normative system of taxation



would allow a controlled foreign subsidiary to be located in a tax haven nation and thereby avoid *all* taxes on the foreign-allocated portion of the sales income. To address this abuse, Congress enacted what is known as Subpart F of our Internal Revenue Code. While retaining our “normative benchmark” rule for foreign sales made through subsidiaries located in countries with *normal* rates of tax (IRC 954 (b) (4)), Subpart F establishes an anti-abuse rule that requires U.S. companies with subsidiaries incorporated in low-tax or no-tax countries to recognize both the domestic *and* the foreign-allocated portion of the income from such transactions.

2.8. Many other Nations did not join our efforts to discourage the use of tax havens. For example, under the territorial model, a company may form a foreign subsidiary or locate a branch in a tax haven country and make sales abroad without paying *any* taxes on the foreign-allocated portion of the sales income. Nations that apply the “territorial” principle in that manner thereby obtain an economic advantage for their export trade.

2.9. As we explain in our submission, the statutory method by which ETI applies our “normative benchmark” of taxation is through a formal redefinition of the concept of “gross income” in Section 61 of the Code. Section 61 has long specified that “gross income” includes income from all sources *except* that it does *not* include items excluded by *other* provisions of the Code. And, Section 114 of the Code now expressly provides that extraterritorial income—foreign-allocated portion of foreign sales income—is *not* encompassed within the general definition of gross income in Section 61. The ETI is thus now an express component of the formal definition of our concept of gross income. That formal definition is an application of, and not a departure from, our historic normative benchmark principles of taxation.

2.10. Because extraterritorial income is not encompassed within the concept of “gross income,” there is no provision of our law that purports to tax that income apart from, or “but for,” the challenged provision. Thus, looking either to the normative benchmarks of our system or the mechanical “but for” test that was applied by the Panel in the PSC case, the exclusion of extraterritorial income under Section 114(a) does not forego taxes “otherwise due” under our system.

2.11. It therefore is not a “subsidy” under Article 1 of the SCM agreement. Under the longstanding “normative” rules both of the United States *and* of territorial systems of taxation, taxpayers have always been able to structure their affairs in a manner that separates the foreign-allocated portion of foreign sales income from the domestic portion and subjects only the domestic portion to domestic taxation.

2.12. As I will explain in a few moments, this allocation of taxing authority flows from the principle of avoiding double taxation on international transactions—it does not represent a “subsidy” within the meaning of the SCM agreement.

### III. ARGUMENT: THE ETI IS NOT EXPORT CONTINGENT

3.1. Second, even when a subsidy in fact exists under Article 1, it is not prohibited by Article 3.1(a) unless it is “contingent on export performance.” As the Appellate Body has emphasized in prior decisions, this means that export must be a *necessary* condition of receiving the subsidy—that is, that the subsidy can be received *only* by exporting.

3.2. That condition of export contingency is not present under either the territorial system or the ETI. Under both systems, a domestic corporation may produce goods for foreign sales either through facilities located at home or abroad. It may also produce such goods abroad through a foreign subsidiary. Because export is thus clearly *not* required for the ETI to apply, there is plainly no *de jure* requirement of export under the statute.

3.3. In decisions such as *Canada-Aircraft*, the Appellate Body has emphasized that the fact that exporters are included within the group of those who may benefit from a challenged provision does not make that benefit “contingent” on exports. Footnote 4 to Article 3.1 also makes that point expressly, by stating that the fact that a subsidy is granted to enterprises that export does not make it an export-contingent subsidy.

3.4. Where the Panel went wrong in this case was by focusing not on the actual operation of the ETI but by instead creating and then criticizing a purely hypothetical statute that would apply *only* to goods manufactured in the United States. The Panel stated that, under this purely hypothetical scheme, such goods

could *only* benefit if they were exported, and concluded that *as to such goods* that sort of statute would provide an export-contingent subsidy.

3.5. The ETI, however, obviously does not apply in the fashion hypothesized by the Panel. Instead, the ETI applies to *all* taxpayers wherever their operations are located. Since any taxpayer is free to obtain the benefit of the ETI—or of any territorial system for that matter—by locating or completing production activities abroad, the Panel was plainly wrong in stating that the ETI provides a subsidy that, as a matter of law, is “tied to” or “contingent on” export performance.

3.6. There is also no basis for saying that the ETI is contingent on export performance on a *de facto* basis. Indeed, no *de facto* challenge was presented in this case, and the Panel expressly declined to make any such determination. Furthermore, no record was assembled that would permit any such analysis to be made. In fact, the *only* evidence adduced on this point was United States Exhibit 9, which explains how domestic manufacturers can and *do* locate facilities abroad to produce goods abroad and thereby earn foreign source income that is excluded from U.S. tax under the ETI.

3.7. The EC offered no evidence to rebut this *de facto* demonstration that the ETI is not export contingent. And, it bears emphasis that if the ETI *were* regarded as export-contingent simply because exporters are among those who may benefit from it, any territorial system would obviously be equally flawed.

#### IV. ARGUMENT: THE ETI IS A VALID MEASURE TO AVOID DOUBLE TAXATION

4.1. Third, even a measure that establishes an export-contingent subsidy is not prohibited under the SCM Agreement if it is part of a “measure to avoid the double taxation of foreign source income.” This settled rule has been an indispensable part of international subsidies agreements since 1979. And it is expressly set forth in footnote 59 to the Illustrative List of Export Subsidies that is referenced in Section 3.1(a) of the SCM agreement.

4.2. As OECD commentary acknowledges, there are two widely accepted types of measures for avoiding double taxation: a credit for foreign taxes paid and an exemption of income derived

in foreign transactions. The U.S. tax system, like the systems of most developed nations, employs a mixture of tax credit and tax exemption provisions. The exemption method applied by the ETI unquestionably qualifies as one of the two accepted methods employed throughout the world to avoid a double tax on income.

4.3. None of the Panel's four criticisms of the ETI as such a measure holds up. First, the Panel suggested that the ETI is "too broad," for it exempts income that other Nations may not tax. The Panel ultimately acknowledged, however, that this objection is not compelling. For example, the territorial model may similarly be said to be "too broad," for it exempts income from domestic taxation without regard to whether taxes are in fact charged by any foreign government.

4.4. Moreover, the United States submitted evidence in this case that *many* Nations—such as the United Kingdom, Chinese Taipei and Saudi Arabia—have tax regimes that are broad enough to reach the foreign-source income that is excluded from our tax by the ETI. No rebuttal of that evidence was offered by the EC or adopted by the Panel. Instead, the Panel ultimately disclaimed independent reliance on the assertion that the ETI exclusion is "too broad."

4.5. The Panel nonetheless went on to make the seemingly inconsistent criticism that the ETI is "too narrow." The Panel asserted that it is too narrow because it is not available unless the goods are sold for consumption or use *outside* the United States. This objection is also not valid.

4.6. If goods manufactured in the United States are *ostensibly* sold overseas but then returned for use in the United States, the ETI exclusion does not apply simply because the income is *not* foreign source even in part—it is *exclusively* U.S. source. There is no foreign source income to exclude when U.S. goods are sold in the U.S., and thus no foreign source income to exclude under the ETI in that situation.

4.7. Alternatively, if goods are manufactured abroad and then sold for use in the United States, the United States again does not exclude the sale income under the ETI but for a different reason—which is that we retain primary taxing jurisdiction over domestic sale transactions. With respect to sales occurring in our country, we ordinarily look to the *foreign* Nation to exclude the U.S.

portion of income from its tax base, just as we exclude the foreign-allocated portion of income for foreign sales under the complementary provisions of the ETI.

4.8. The ETI exclusion cannot properly be criticized as “too narrow” because it looks to foreign governments to cooperate in this manner in the avoidance of double taxation. By authorizing measures to avoid double taxation, the SCM agreement does not require *any* Nation *always* to defer to foreign taxation when both Nations have a claim to tax a transaction. No model of taxation requires the complete forfeiture of basic taxing jurisdiction contemplated by the Panel’s improper objection that the ETI is “too narrow”—and no Nation follows the model that the Panel would purport to require.

4.9. Third, the Panel suggested that unilateral measures to avoid double taxation are simply unnecessary because many treaties now address this issue on a bilateral basis. Any suggestion that treaties are the *only* proper remedy for double taxation is, of course, flatly contrary to the provisions of the SCM agreement that expressly protect the right of Nations to adopt measures *of their own* to avoid double taxation.

4.10. Finally, and most curiously, the Panel stated that while none of these objections are *independently* dispositive, somehow *on balance* they support a conclusion that the ETI is not a measure to avoid double taxation. The personal and subjective character of the Panel’s reasoning is emphasized by the Panel’s extraordinary and undiplomatic assertion that no “legislator” could “reasonably” view the ETI measure as one that seeks to avoid double taxation.

4.11. We do not know where the Panel has obtained the insight to determine how a “reasonable legislator” forms his conclusions. What *is* clear to us, however, is that several hundred reasonable legislators reviewed the text of the ETI, considered the legislative reports that explain how it serves to avoid double taxation on foreign transactions, and voted to enact it with that purpose in mind.

4.12. As this Appellate Body has noted in cases such as *Japan-Alcoholic Beverages*, legislators function in a complex world. Domestic legislation cannot resolve, and should not be expected to resolve, *all* theoretical double tax issues in order to qualify as

a “*measure* to avoid double taxation.” The SCM agreement provides great latitude and discretion to legislators in adopting such measures—for the controlling provision emphasizes that nothing in the subsidy agreement “limits” the measures that may be adopted for this purpose.

4.13. There is, in short, no basis in the text of the SCM agreement for the Panel to act as a “super legislator” to determine what “reasonable” measures are needed to avoid double taxation. That determination is expressly left to the discretion of each Nation under the Agreement; it has not been delegated to the WTO.

4.14. The issue presented in this case has now been a source of international tension for over three decades. What is needed in this context is clear guidance and administrable standards. Instead, the Panel has adopted a broad, non-textual approach that places the ordinary tax laws of every Nation at risk. This threatens to extend, rather than resolve, this longstanding international dispute

## V. ARGUMENT: THE ETI DOES NOT VIOLATE GATT ARTICLE III:4

5.1. The Panel also addressed an issue of secondary and less fundamental importance—which is whether one narrow feature of the ETI violates Article III:4 of the GATT. That Article requires that foreign products be given “treatment no less favorable” than domestic products under laws affecting their domestic sale or use. The Panel concluded that Article III:4 is violated by a provision in the ETI that permits the foreign source portion of sale income to be excluded only when no more than 50% of the fair market value of the item consists of foreign articles and foreign labor inputs.

5.2. Under the decision of the Appellate Body in *Korea-Beef*, the Panel’s *de jure* conclusion cannot be sustained because the challenged provision does not “necessarily” create a preference for domestic over foreign articles. Instead, the record demonstrates that the 50% requirement can be met whenever *other* components of value—such as intangibles like patents or other licenses, or profits, or rents or any other input—form at least 50% of the ultimate value of the article. And, these other components of value may have either a foreign or U.S. source.

5.3. Because the challenged measure may be satisfied in numerous ways that do *not* require *any* use of U.S. goods, it cannot be said “necessarily” to create any preference for domestic over foreign goods in violation of Article III:4. And, here, as in *Korea-Beef*, the Panel failed to make a *de facto* inquiry into whether, *as applied*, the measure would have the practical consequence of reducing the opportunity of foreign goods to compete with domestic goods. Mere speculation by the Panel about how the statute *might* operate is no substitute for the actual factual inquiry required before a *de facto* violation could be determined.

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## E. OTHER TRADE AGREEMENTS AND RELATED ISSUES

### 1. U. S. International Trade Agenda

On May 10, 2001, the White House released the President's 2001 International Trade Agenda. In particular, the Agenda focused on the need for renewal of expedited legislative procedures for negotiating trade agreements, referred to as Trade Promotion Authority. It also stressed the need to address trade-related labor and environmental concerns. Excerpts below explain the President's Agenda and provide an illustrative “toolbox” of actions that the United States can take in combination with trade negotiations to promote labor and environmental related goals.

The full text is available at [www.whitehouse.gov/news/releases/2001/05/20010511.html](http://www.whitehouse.gov/news/releases/2001/05/20010511.html).

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For some 60 years, Presidents and Congresses of both parties worked together to open markets around the globe. This successful collaboration is among the main reasons for 17 years of economic growth, peace and freedom that we know today.

But since 1994, the Executive Branch has not had the authority it needs from the Congress to negotiate agreements to continue this prosperity. The bill has now come due. The European Union has 27 preferential or special customs agreements with other countries and is negotiating 15 more. Japan is negotiating a free trade agreement with Singapore and considering agreements

with Mexico, Korea and Chile. There are over 130 preferential trade agreements in the world today—and the United States is a party to only two of them.

Now, more than ever, U.S. leadership is essential to reinvigorating the international trading system, including launching a new round of global negotiations, as well as regional and bilateral negotiations.

History has shown that expanded trade—imports as well as exports—leads to more prosperous U.S. businesses, more choices of goods and lower prices for consumers, and more opportunities for American farmers and workers leading to higher wages, more jobs and economic growth. Expanding trade brings particular benefits to lower-income Americans who are squeezed both as consumers and taxpayers.

Expanding trade also has many benefits abroad. Open markets promote economic and political freedom around the world; economic and political freedom in turn creates competition, opportunity and independent thinking that strengthen democracy; and greater political freedom and democracy across the globe substantially enhance U.S. national security. As we dismantle trade barriers around the world, especially in the developing world, we help create the economic and social conditions necessary for countries to make progress on the environment, observance of labor standards, the protection of children, and other critical issues.

The President's trade agenda for 2001 is intended to further each of these benefits of expanding markets for American consumers, farmers and workers, and to advance a forward strategy for freedom, economic development and increased living standards around the world by pursuing a new round of global trade negotiations, a Free Trade Area of the Americas, and other important regional and bilateral agreements.

### **The President's 2001 International Trade Agenda**

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The President seeks to build an American trade agenda from the ground up, reflecting the views and interests of American farmers, workers, businesses, and the American people. Our negotiating objectives—to open foreign markets for U.S. goods, serv-



ices, farm products, and intellectual property, combat unfair trade practices, protect American businesses abroad from discriminatory treatment to name but a few—must represent an agenda that serves the interests of all Americans.

An important part of that agenda is addressing trade-related labor and environmental concerns. As President Bush said last month in Quebec City: “Our commitment to open trade must be matched by a strong commitment to protecting our environment and improving labor standards.”

The conceptual framework for U.S. Trade Promotion Authority set out below recognizes that there are many ways to carry out this commitment. The TPA framework makes clear that these goals must be pursued in a way that respects U.S. sovereignty and avoids self-defeating protectionism.

Enclosed with this agenda is an illustrative “toolbox” of actions that the United States can take in combination with trade negotiations to promote these important goals. The President has expressed his desire to work with the Congress to refine these ideas as well as the other concepts included in the framework for U.S. Trade Promotion Authority.

The outline that follows also describes the other key components of the President’s 2001 trade legislative agenda. As an important complement to the grant of U.S. Trade Promotion Authority, the President seeks to improve this country’s trade adjustment assistance programs for workers by emphasizing improvements in skills training. To rebuild a national consensus in support of trade, American workers must have the tools that allow them to compete in new jobs and new industries when job transitions occur. Consistent with the President’s overall goals for training and education, these programs should increasingly be geared toward helping American workers meet the challenges of the 21st century.

The President’s agenda also asks the Congress to implement three important commercial agreements to help bolster security and promote open markets in vital regions of the world—a bilateral free-trade agreement with Jordan and bilateral trade agreements with Vietnam and Laos. In addition, the President urges the Congress to re-authorize the Generalized System of Preferences program and Andean Trade Preferences Act, and pass legislation providing similar trade benefits for the nations of southeast

Europe, a region that has been beset by conflict in recent years. These programs are important because they allow us to help developing countries and emerging markets begin the process of integrating themselves into the world trading system.

Last year, the Congress enacted the African Growth and Opportunity Act to encourage and promote economic growth and reform in sub-Saharan Africa. This legislation holds real promise for helping to integrate African economies into the world trading system. The Congress should consider whether more progress can be made along these lines.

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### **Labor and Environment “Toolbox”**

The following illustrative list identifies a “toolbox” of actions the United States could take in combination with trade negotiations to promote the protection of children, adherence to core labor standards, and mutually supportive trade and environmental protection policies.

#### **Labor:**

- Use labor standards in existing and proposed preferential trade programs—e.g., the Generalized System of Preferences program and programs under the African Growth and Opportunity Act, the Andean Trade Preference Act, the Caribbean Basin Trade Partnership Act, and the Southeast Europe Trade Preference Act—to build respect for, adherence to, and enforcement of core labor standards.
- Employ U.S. Agency for International Development (USAID) and other assistance programs to encourage acceptance of, adherence to, and national enforcement of core labor standards.
- Urge the World Bank and the regional development banks to encourage borrowing countries to guarantee core labor standards and to collaborate in international efforts to reduce child labor. The multilateral and regional development banks also should try to ensure that in consultations on their country operations with civil society, unions are represented.

- Encourage the World Trade Organization (WTO) to cooperate with international financial institutions to examine the interrelationships between social issues and global economic integration, including between labor standards and trade.
- Strengthen and raise the profile of the International Labor Organization (ILO) and provide strong support for ILO initiatives aimed at fostering member countries' adherence to core labor standards, such as the ILO Declaration on Fundamental Principles and Rights at Work and the new Convention on the Worst Forms of Child Labor.
- Strengthen and raise the profile of the ILO by improving the ILO's ability to fact-find, spotlight, and hold member countries accountable for violations of core labor standards by strengthening the ILO's existing mechanisms for enforcing member countries' adherence to the conventions they have ratified.
- Encourage cooperative arrangements (joint work programs) between the WTO and the World Health Organization and the ILO.
- Use the labor standards adopted by the Overseas Private Investment Corporation (OPIC) to build respect for, and adherence to, core labor standards.

**Environment:**

- Improve the effectiveness of United Nations environmental programs, in particular those focused on environmental capacity-building.
- Work to increase the extent to which key environmental concerns are included in multilateral and regional development bank lending and structural adjustment strategies, e.g., by bolstering efforts to strengthen environmental and related safeguards built into lending programs, by supporting initiatives to enhance the capacity of borrowing governments to protect the environment, or by giving consideration to augmenting funding for debt-for-nature swaps.
- As appropriate, highlight in National Trade Estimate country reports, and work to address, measures that both negatively affect the environment and distort trade and investment flows.

- Improve the effectiveness of the North American Development Bank's activity on environmental infrastructure projects.
- Propose the inclusion in WTO Trade Policy Reviews and in APEC Individual Action Plans of discussion of ways in which a country's or a member economy's trade and environment policies mutually reinforce each other.
- Expand environmental elements in USAID's country plans.
- Use the environmental policies of the U.S. Export Import Bank to build respect for, adherence to, and enforcement of environmental protection laws and regulations.
- Promote adherence to environmental guidelines by foreign export credit agencies.
- Use the environment standards adopted by OPIC to build respect for, and adherence to, environmental protection laws and regulations.

## **2. Environmental Review of Trade Agreements**

In a Press Release of April 20, 2001, the Office of the United States Trade Representative ("USTR") announced that the Bush Administration would be conducting written environmental reviews of major trade agreements and announced initiation of an environmental review of the negotiations on agriculture and services underway in the WTO. Available at [www.ustr.gov/releases/2001/04/01-24.html](http://www.ustr.gov/releases/2001/04/01-24.html). On April 25, USTR issued a notice in the Federal Register requesting written public comment concerning the scope and timing of the environmental review. 66 Fed.Reg. 20846 (Apr. 25, 2001). Excerpts below from the Federal Register notice explain the context and application of the undertaking.

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Executive Order 13141, Environmental Review of Trade Agreements in November, 1999, 64 FR 13141 (Nov. 16, 1999), and its implementing guidelines, 65 FR 79442 (Dec. 19, 2000), formalize the U.S. policy of conducting environmental reviews for certain major trade agreements. Reviews are used to identify potentially significant environmental impacts (both positive and negative), and information from the review may facilitate con-

sideration of appropriate responses where impacts are identified.

The Executive Order identifies certain types of agreements for which an environmental review is mandatory: comprehensive multilateral trade rounds; bilateral or plurilateral free trade agreements; and major new trade liberalization agreements in natural resource sectors. For other types of agreements, the Executive Order and guidelines direct USTR, through the TPSC ["Trade Policy Staff Committee"], to determine whether a review is warranted based on such factors as the potential significance of reasonably foreseeable positive and negative environmental impacts.

The World Trade Organization (WTO) Agreement on Agriculture and the General Agreement on Trade in Services (GATS) call for WTO members to undertake further negotiations to liberalize trade in agriculture and services, respectively. The agriculture and services negotiations (known as the "built-in agenda" for agriculture and services) are currently underway in the WTO. USTR provided general background on the negotiations and requested public comment on general U.S. negotiating objectives as well as country and item-specific export priorities for agriculture and services in previous Federal Register notices. *See* 65 FR 16450 (Mar. 28, 2000); 66 FR 18141 (April 5, 2001).

In June, 2000, the United States submitted a proposal for long-term, comprehensive agricultural reform in the WTO. The proposal calls for substantial reductions or elimination of tariffs, expansion of remaining tariff-rate quotas, elimination of export subsidies, disciplines on the use of export restrictions on agricultural products, simplification of rules applying to domestic support, and establishment of a ceiling on trade-distorting support that applies equally to all countries. The United States presented a more detailed position on the tariff rate quota element of the proposal. The U.S. proposals are available on USTR's website at [www.ustr.gov](http://www.ustr.gov).

In July, 2000, the United States submitted a comprehensive proposal concerning the conduct of the services negotiations and presented 12 detailed negotiating proposals in December, 2000, addressing 11 services sectors (accountancy services; audiovisual and related services; distribution services; education and training services; energy services; environmental services; express delivery services; financial services; legal services; telecommunications,

value-added network, and complementary services; and tourism services) and one GATS “mode of supply” (movement of natural persons). The U.S. proposals (also available on the USTR website) seek to remove market access, national treatment, and other restrictions affecting services and services suppliers in these and other areas, while maintaining the ability to regulate in the public interest. Thus, the sectoral coverage of the services negotiations is broad. This notice requests commenters’ views, in particular, on which service sectors to address or not to address in the environmental review.

Pursuant to the Executive Order and guidelines, USTR has determined through the TPSC that the built-in agenda negotiations in agriculture and services warrant an environmental review. The volume of trade affected in both agriculture and services is significant. U.S. agricultural trade in 2000 was over \$ 100 billion. U.S. exports of commercial services (*i.e.*, excluding military and government) were \$ 255 billion in 1999, supporting over 4 million services and manufacturing jobs in the United States. Cross-border trade in services accounts for more than 25 percent of world trade, or about \$ 1.4 trillion annually. U.S. commercial services exports have more than doubled over the last 11 years, increasing from \$ 118 billion in 1989 to \$ 255 billion in 1999.

Agricultural trade can be expected to have implications for land resource use, which in turn may have implications for the environment (e.g., water quality and quantity issues). In addition, the United States has previously undertaken analyses that have indicated potential environmental benefits resulting from elimination of agricultural export subsidies, a key U.S. objective in the negotiations. Further examination of this issue might be appropriate in the environmental review.

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### **3. U.S.-Jordan Free Trade Agreement**

On December 17, 2001, a Free Trade Agreement between the United States and Jordan entered into force, marking the first trade agreement between the United States and an Arab state. Agreement Between the United States of America and the Hashemite Kingdom of Jordan on the Establishment of

a Free Trade Area, December 17, 2001. 41 I.L.M. 63 (2002). The Agreement was implemented in the United States through the United States-Jordan Free Trade Area Implementation Act, Pub. L. No. 107-43, 115 Stat. 243, 19 U.S.C. § 2112 note. Pursuant to the authority of that Act, President Bush issued Proclamation 7512 of December 7, 2001, amending the Harmonized Tariff Schedule to provide preferential tariff treatment for products of Jordan, 66 Fed. Reg. 64497 (December 13, 2001). In a Press Release of December 10, 2001, Robert B. Zoellick, U.S. Special Trade Representative, explained that "[t]he proclamation provides for the elimination of tariff and non-tariff barriers to bilateral trade in virtually all industrial and agricultural products within 10 years. As of December 17, U.S. exports to Jordan will similarly benefit from increased access to the Jordanian market."

The U.S.-Jordan Agreement is the first Free Trade Agreement to include provisions on environment and labor in the treaty itself (Articles 5 and 6) although NAFTA has relevant language in side agreements (North American Agreement on Environmental Cooperation, 32 I.L.M.1480 (1993), and North American Agreement on Labor Cooperation, 32 I.L.M. 1499 (1993). Article 18 addresses, among other things, the applicability of these obligations in the federal system of the United States. Articles 5, 6 and 18 of the Agreement are set forth below.

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## ARTICLE 5. ENVIRONMENT

1. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic environmental laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.

2. Recognizing the right of each Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental laws, each Party shall strive to ensure that its laws provide for high levels of environmental protection and shall strive to continue to improve those laws.

3. (a) A Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement. (b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bonafide* decision regarding the allocation of resources.

4. For purposes of this Article, “environmental laws” mean any statutes or regulations of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through:

- (a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
- (b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; or
- (c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Party’s territory, but does not include any statutes or regulations, or provision thereof, directly related to worker safety or health.

## ARTICLE 6: LABOR

I. The Parties reaffirm their obligations as members of the International Labor Organization (“ILO”) and their commitments under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Parties shall strive to ensure that such labor principles and the internationally recognized labor rights set forth in paragraph 6 are recognized and protected by domestic law.



2. The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.

3. Recognizing the right of each Party to establish its own domestic labor standards, and to adopt or modify accordingly its labor laws and regulations, each Party shall strive to ensure that its laws provide for labor standards consistent with the internationally recognized labor rights set forth in paragraph 6 and shall strive to improve those standards in that light.

4. (a) A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement.

(b) The Parties recognize that each Party retains the right to exercise discretion with respect to investigatory, prosecutorial, regulatory, and compliance matters and to make decisions regarding the allocation of resources to enforcement with respect to other labor matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with subparagraph (a) where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bonafide* decision regarding the allocation of resources.

5. The Parties recognize that cooperation between them provides enhanced opportunities to improve labor standards. The Joint Committee established under Article 15 shall, during its regular sessions, consider any such opportunity identified by a Party.

6. For purposes of this Article, "labor laws" means statutes and regulations, or provisions thereof, that are directly related to the following internationally recognized labor rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) a minimum age for the employment of children; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

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## ARTICLE 18: MISCELLANEOUS PROVISIONS

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2. For purposes of Articles 5 and 6, “statutes and regulations” means,

- (a) with respect to Jordan, an act of the Jordanian Parliament or by-law or regulation promulgated pursuant to an act of the Jordanian Parliament that is enforceable by action of the Government of Jordan; and
- (b) with respect to the United States, an act of the United States Congress or regulation promulgated pursuant to an act of the U.S. Congress that is enforceable, in the first instance, by action of the federal government.

### **Cross-references**

*Relationship Between U.S. Constitution Treaty Clause and President’s Ability to Enter into Executive Agreements (NAFTA), Chapter 4.A.2.*

*International Civil Aviation Organization Assembly Resolution on cooperation in fighting terrorism, Chapter 19.D.2.*

## CHAPTER 12

### Territorial Regimes and Related Issues

#### A. LAW OF THE SEA AND RELATED BOUNDARY ISSUES

##### 1. United Nations Convention on Law of the Sea

###### a. *United States' non-party status*

In 1994 the United States transmitted the United Nations Convention on the Law of the Sea, with Annexes, done at Montego Bay, December 10, 1982 ("UNCLOS"), to the Senate for advice and consent to accession. S. Treaty Doc. No.103-39 (1994). At the same time it transmitted the Agreement Relating to the Implementation of Part XI of UNCLOS, signed by the United States on July 29, 1994, for the Senate's advice and consent to ratification. *Id.* The Senate has not acted on either instrument. On November 27, 2001, Ambassador Sichan Siv, U.S. Representative on the UN Economic and Social Council, made a statement on Oceans and Law of the Sea in the UN General Assembly expressing United States support for the Convention.

The full text of Ambassador Siv's statement is available at [www.un.int/usa/o1\\_184.htm](http://www.un.int/usa/o1_184.htm).

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The United States has long accepted the UN Convention on the Law of the Sea as embodying international law concerning traditional uses of the oceans. The United States played an impor-

tant role in negotiating the Convention, as well as the 1994 Agreement that remedied the flaws in Part XI of the Convention on deep seabed mining. Because the rules of the Convention meet U.S. national security, economic and environmental interests, I am pleased to inform you that the Administration of President George W. Bush supports accession of the United States to the Convention.

\* \* \* \*

***b. United States as observer***

The United States attended the Eleventh Meeting of States Parties to UNCLOS as an observer from May 14–18 in New York City. In its observer status, the United States made statements on two issues, excerpted below: 1) the requirement for States Parties to submit coordinates of the outer limits of their continental shelf to the Commission on the Limits of the Continental Shelf (“CLCS”) and its legal ramifications; and 2) the range of issues for which Meetings of States Parties may be convened consistent with UNCLOS. On the first issue, the Meeting adopted a decision to extend the earliest time within which States would have to submit coordinates to the CLCS to May 13, 2009.

The full text of the two Statements is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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. . . [W]e believe that there is a need for a decision of the Meeting of States Parties to clarify the date on which the 10-year period for submissions to the CLCS commences. Second, we believe, as well, that there is a broader issue regarding submissions, even after the aforementioned clarification is made.

With respect to the first issue, it was only after May 13, 1999, when the Scientific and Technical Guidelines were adopted by the Commission, that States had the information necessary to commence preparing submissions to the Commission, taking into account the Commission’s expectations. In our view, this is the logical date to view the 10-year period to have begun. This date does

no violence to the Convention and should assist several states, particularly developing states. Action in this regard should be taken by a decision of States Parties, for which there is precedent.

With respect to the second issue regarding submissions more generally, there are a number of factors to bear in mind in approaching this issue.

First, a continental shelf is inherent in a coastal state's sovereign territory. The fact that a state has not submitted data in relation to its shelf to the CLCS does not, and cannot, mean that it has lost part of its shelf, but rather that it has not, in effect, a settled boundary vis-a-vis the Area. A state may, of course, explore and exploit its shelf beyond 200 miles, even before it makes a submission.

Second, a coastal state which does not have resources to make a scientifically sound submission must not be prejudiced if it fails to make a full submission within the 10-year period.

Third, in complying with the provisions of Article 4 of Annex II, a state is reasonably expected to make a submission using the best information it has available. It is recognized that a state may not have sufficient data upon which the Commission could make a recommendation. That state should nevertheless be considered to have complied with the 10-year period if it informed the Commission that it intends to make a further submission. In this regard, even generally accepted charts might be the essence of the initial submission. Good faith is essential. Putting the Commission and the international community on notice is important.

Fourth, technical issues which might result in a limited submission might include: environmental dangers and uncertainties in gathering data using traditional available methods; extreme weather conditions; unavailability of affordable technical assistance; and lack of a scientific consensus on, for example, the evaluation of certain data. In this latter regard, scientists know now much more than they knew when Article 76 was negotiated. But more will be known in the years ahead.

Fifth, the Convention was negotiated to foster stability in ocean space. Stability of expectations must be enhanced, not diminished. While no state may assert jurisdiction over the Area, no state may be deprived of a part of its continental shelf recognized by international law. If a state over-reaches or if a state is somehow deprived, instability would result. But it should be noted

that perhaps 30–40 states have a continental shelf beyond 200 miles. Therefore, realistic expectations are a necessity.

Sixth, the Commission may not prejudice boundary delimitation matters between opposite and adjacent states or matters beyond the competence of the Commission and beyond the framework of the Convention.

. . . [W]e believe that the aforementioned approach is consistent with the Law of the Sea Convention as written; it requires no amendment of the Convention; it requires no implementing Agreement. And we must be wary of any amendments to the Convention or of agreements which essentially amend the Convention. The balance of the Convention should not be buffeted or put at serious risk by actions which cannot be confined to the narrow issue before us.

\* \* \* \*

Article 319 imposes a duty on the United Nations Secretary General to convene meetings of States Parties.

Under customary international law, as reflected in the Vienna Convention on the Law of Treaties, this provision must be interpreted in accordance with the ordinary meaning of its terms in their context and in light of the Convention's object and purpose. Any subsequent agreement between the Parties regarding the interpretation of the Convention, and subsequent practice between the Parties in the application of the agreement, are also to be taken into account in its interpretation. To the extent that the terms of the provision are ambiguous, the relevant negotiating history of the provision should be considered.

The text of Article 319 provides in relevant part: "2. In addition to his functions as depositary, the Secretary General shall: (a) report to all States Parties, the Authority, and competent international organizations on issues of a general nature that have arisen with respect to this Convention; . . . (e) convene necessary meetings of States Parties in accordance with this Convention."

The mandate to the Secretary General to convene meetings is qualified in two respects: first, it is limited to meetings that are "necessary"; second, the mandate is linked to other parts of the Convention.

Only two other areas of the Convention refer to "meetings of States Parties": (a) Annex II, which establishes the Commission on the Limits of the Continental Shelf and requires the election

of its members at a meeting of States Parties; and (b) Annex VI, the Statute of the International Tribunal for the Law of the Sea, which requires the election of Tribunal members and the determination of the Tribunal's budget to be performed at a meeting of the States Parties.

No other provisions of the Convention either require action by a meeting of the States Parties or acknowledge the possibility of action by a meeting of States Parties.

As a result, a strict reading of Article 319(2)(e) suggests that this provision should not be interpreted to mandate or authorize the Secretary General to convene a far-reaching review of general matters related to the Convention.

It is also important to note that Article 319(2)(e) differs significantly from language used in other multilateral Conventions—typically multilateral environmental agreements—that have established autonomous institutional arrangements based on a “Conference of Parties (COP).” These agreements typically contain express language referring in varying degrees to the COP's ongoing role in overseeing the implementation and observance of the Convention. Examples include the RAMSAR Convention, Article 6 where the COP shall review and promote implementation of the Convention; CITES, Art. XI (3); Bonn Convention on Conservation of Migratory Species, Article VII (5); Basel Convention, Article 15 (5); and the Framework Convention on Climate Change, Article 7 (2). Several of these agreements predate the Law of the Sea Convention. The absence of such language in the LOS Convention indicates that the negotiators did not envision the establishment of a similar institutional arrangement here.

This reading is further supported by the context of Article 319. Paragraph 2 of Article 319 makes a clear distinction between (a) meetings of the States Parties, and (b) the issuance of a report by the Secretary General on “issues of a general nature that have risen with respect to this Convention.” This context makes it clear that issues of a general nature are allocated to the Secretary General's report rather than to a Meeting of States Parties.

The subsequent practice of the Parties to the Convention lends still further weight to a narrow reading of Article 319 (2) (e).

The Meetings of States Parties have focused on duties related to the Tribunal and the Shelf Commission (which are the specified functions of the annual meetings) and have avoided expand-

ing their agendas to address wider LOS-related questions. The issues raised during this meeting concerning the 10 year rule was primarily an organizational question related to the delay in the elections for the Commission.

At the same time, the annual meetings of the United Nations General Assembly have included since 1982 an agenda item on the law of the sea. That forum has thus performed a broad review function regarding issues of a general nature. The recent establishment of the UN Informal Consultative Process, pursuant to an initiative of the Rio Group and SOPAC, emanating from CSD-7, is designed to allow more time for discussion of implementation and coordination of matters based on the Secretary General's report.

These practices together provide an important indication of the common and contemporaneous understanding of the Parties regarding the meaning of Article 319 and the intended scope of the meeting of States Parties.

To the extent that any ambiguity about the narrow scope of Article 319(2)(e) remains, the negotiating history of the Convention provides a strong negative implication in support of the narrow scope referred to above. During the negotiations, certain delegations supported various proposals that would in effect have established a mechanism for the periodic review of the Convention, including the establishment of a periodic assembly to review common problems and address new uses of the seas. These proposals all failed to attract support and were ultimately reduced to the language now appearing in Article 319(2)(a), concerning the general reports to be made by the Secretary General. (See *V United Nations Convention on the Law of the Sea 1982: A Commentary*, G. Nordquist, ed. 1989 at 289-99).

Separately, the negotiating Conference requested the Secretary General to prepare a study of his functions under the draft Convention, including under then-draft Article 319(2)(a). The Secretary General's study, submitted in 1981, makes it clear that any general review function under the Convention would be handled as part of his reporting obligation in Article 319, and that such reporting would be prepared "on the basis of systematic consultations." But it also cautions that, before any mechanisms for such consultation could be established, "further work would be needed on possible alternative methods for consulting governments . . . and ensuring better coordination on ocean space matters."



This negotiating history strongly suggests that the delegations to the negotiating conference never intended to empower the meeting of the States Parties to perform a review or even consultation function regarding general issues pertaining to the Convention or its implementation.

\* \* \* \*

**c. Commission on Ocean Policy**

The Oceans Act of 2000, Pub. L. No. 106-256, 114 Stat. 644, which became effective in January 2001, established a Commission on Ocean Policy to make recommendations for coordinated and comprehensive national ocean policy in the United States. Within 18 months after its establishment, the Commission is required to submit a final report to Congress and the President of its findings and recommendations, following public review and including comments received from any Governor of a coastal state of the United States regarding recommendations. Under § 4, the President, in consultation with State and local governments and non-Federal organizations and individuals involved in ocean and coastal activities, is then to submit to Congress a statement of proposals to implement or respond to the Commission's recommendations for a national policy for the responsible use and stewardship of ocean and coastal resources for the benefit of the United States.

**(1) State Department Presentation**

The Commission began conducting public hearings and consultations in 2001. Excerpts below from a presentation by Ambassador Mary Beth West, Deputy Assistant Secretary for Oceans and Fisheries, Department of State, to the Commission on November 14, 2001, focus on issues where the State Department believes recommendations by the Commission would be of particular value. The full text of Ambassador West's presentation is available at [www.state.gov/s/l](http://www.state.gov/s/l).

I appreciate the Commission's invitation to the State Department to make a presentation today, in recognition of the international elements that are inevitably intertwined with a national oceans policy. . . .

\* \* \* \*

The State Department performs two vital functions in [the process of developing international oceans policies.] First, it serves to bring Federal agencies together to develop and pursue comprehensive, unified international oceans policy. One institutional mechanism for this is the Oceans Policy Coordinating Committee, established by the National Security Council and chaired by the State Department. Second, the Department is the agency facilitating the diplomatic process. While State is not usually the lead agency for substantive oceans issues, its role as facilitator, coordinator, and negotiator requires full awareness of the substance and context, and adequate resources to maintain that expertise and pursue the international oceans agenda.

Fisheries provide a good example of this process cycle. If stocks found only in our own EEZ are overfished, state agencies or the appropriate fishery management council can stop that overfishing and restore the stocks. But many overfished stocks are also harvested on the high seas or in other countries' EEZs. They can't be managed in isolation. Cooperation with other countries is essential.

So, at the national level, we assess the problem, develop potential solutions. And then take those solutions to the regional or global level. . . . The rules and regulations established globally or regionally must then be implemented nationally and locally.

. . . [L]et me highlight, from the State Department's view, four of the current international oceans policy issues that may be of interest to the Commission. . . .

First, the United Nations Convention on the Law of the Sea represents the overarching legal framework governing rights and obligations in the oceans. The United States was deeply involved in all aspects of the development of the Convention, including the notable success we achieved in reshaping its seabed mining provisions in the early 1990s. As you know, the United States is not yet a party to the Convention, although it has long been U.S. policy to act in accordance with its provisions concerning traditional uses of the oceans.

Our non-party status precludes U.S. membership on the Continental Shelf Commission, all of whose members will be elected next spring. The decisions of this commission will significantly affect the oil and gas industry. Non-party status will prevent the U.S. from nominating judges for election next spring to serve on the Law of the Sea Tribunal. It also hampers us in ensuring that our deep seabed mining industry is protected in development of rules by the Seabed Mining Authority. Our challenge is to maintain U.S. oceans leadership, a challenge that we could meet much more easily as a party to the Convention. The Administration therefore supports U.S. accession to the LOS Convention.

Second, the spread of invasive species through the discharge of ships' ballast water has devastated several marine ecosystems throughout the world. . . .

The challenge lies in the development of adequate technologies for use aboard ships that will eliminate harmful aquatic organisms and pathogens, yet allow maritime commerce to flourish. To draft a treaty based on a specific standard, we need an idea of what's technologically possible; but right now, we don't have that knowledge. We are aware that the Commission will look at the oceans research and development framework. This issue provides an example of the importance of well-coordinated, timely research and development for successful pursuit of our policy agenda.

The third issue concerns coastal management, which the U.S. supports in a number of areas around the world. . . . The difficulty, however, lies in implementation—in translating the CEP regional programs into national action. . . .

Finally, in the wake of the September 11th attacks, the security of the world's marine transportation system must be re-examined. Ships, ports, and offshore terminals all have vulnerabilities capable of being exploited with potentially devastating effects to human life, the economy, and the marine environment. The [International Maritime Organization ("IMO")] intends to undertake action in the near future. A resolution that will be introduced at IMO next week will call for a general review of international treaties concerning the safety and security of ships and ports, and the prevention of piracy and acts of terrorism. The U.S. must maintain the lead during the review phase, as shortfalls are identified and solutions developed. The challenge lies in persuading

the international community to expand, in a real way, IMO's role in the maritime security arena. The Commission could well examine the potential roles the IMO could play in ensuring worldwide maritime security, and develop appropriate recommendations.

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*(2) Commission Resolution on UNCLOS*

Also on November 14, 2001, the Commission on Ocean Policy adopted a Resolution urging the accession of the United States to the United Nations Law of the Sea Convention. Secretary of State Powell responded to the Resolution on December 12, 2001, as provided below.

The full text of the letter is available at [www.state.gov/sl](http://www.state.gov/sl).

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. . . The resolution conveys a real sense of urgency, both through its words and through its timing, as the Commission's first policy pronouncement.

Deputy Assistant Secretary Mary Beth West testified before your Commission on November 14, explaining the detrimental effects of our non-party status. You may be aware that Ambassador Sichan Siv, two weeks later, announced at the UN General Assembly that the Bush Administration supports U.S. accession to the Convention.

I am aware of the elections scheduled for April 2002 for members of the Commission on the Limits of the Continental Shelf and for judges of the International Tribunal for the law of the Sea, and the benefits the United States could expect from representation on those bodies. Please be assured that we share your views on the importance of this Convention and are working actively on it.

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**2. Japanese Lethal Whaling Research Program**

In August 2001 Japan concluded its second year of an expanded lethal whaling research program in the North Pacific. On August 9, 2001, Richard Boucher, Spokesman for

the Department of State, released the following Statement of U.S. objections to the Japanese program.

The Statement is available at [www.state.gov/r/pa/prs/ps/2001/4501.htm](http://www.state.gov/r/pa/prs/ps/2001/4501.htm).

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The Government of Japan has reported that it has taken 100 minke, 50 Bryde's and 8 sperm whales as part of the second year of its expanded lethal research program in the North Pacific. Japan also reported that it took 1 sei whale by accident.

The United States, along with other nations, has expressed at the highest levels its objection to the expansion of Japan's lethal research program since Japan first announced the expanded program in 2000. The International Whaling Commission, following review by its Scientific Committee, adopted a resolution in July 2000 urging Japan to refrain from undertaking this program. At its recent 2001 meeting, the International Whaling Commission again adopted a resolution critical of the expansion of Japan's lethal North Pacific research program. The United States reiterates its strong support of the international community's call on Japan to cease this lethal research program.

In September 2000, the United States certified Japan under the Pelly Amendment to the Fishermen's Protective Act of 1967 for undermining the conservation program of the International Whaling Commission. The United States continues to consider options open to it in response to Japan's expanded lethal whaling program in the North Pacific.

All whale species are protected under the U.S. Marine Mammal Protection Act, and sperm and sei whales are listed as endangered under the U.S. Endangered Species Act.

### **3. Global Fisheries Agreement**

On December 11, 2001, the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, done in New York August 1995, U.N. Doc. A/CONF.164/37, entered into force. The full

text of the Agreement is available at [www.un.org/Depts/los/convention\\_agreements/convention\\_overview\\_fish\\_stocks.htm](http://www.un.org/Depts/los/convention_agreements/convention_overview_fish_stocks.htm).

The United States is among thirty nations to have ratified the agreement. The State Department commented on the significance of the treaty to the United States in a Media Note released the same day, set forth below.

The Media Note is available at [www.state.gov/r/pa/prs/ps/2001/6799.htm](http://www.state.gov/r/pa/prs/ps/2001/6799.htm).

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A global treaty to address over fishing on the high seas enters into force today, opening a new era in international fishery management. The U.S. is among thirty nations to ratify this binding United Nations agreement, which sets new, compulsory standards for managing highly migratory and shared fishery resources. Malta deposited its instrument of ratification one month ago, and as the thirtieth country to do so, brought the treaty into force today.

Provisions of the treaty greatly enhance conservation and management efforts by ensuring that the standards for determining when such measures are necessary are strengthened in favor of effective resource conservation. Parties will also cooperate in the collection and exchange of fishery data and give enforcement agents increased authority to board and inspect fishing vessels on the high seas to ensure compliance with conservation measures. The agreement also obligates member nations to settle disputes peaceably.

Another important aspect of the agreement is the affirmative commitment of parties to cooperate in regional fisheries management organizations. The United States has proactively implemented this aspect of the agreement since our ratification in 1996. The U.S. played a leadership role in negotiations to establish management organizations in several previously unmanaged fisheries, notably including the successful conclusion of agreements to manage fisheries in the Central and Western Pacific and Southeast Atlantic Oceans.

Adopted in New York in August 1995, the treaty is officially known as the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of December 10, 1982, Relating to the Conservation and Manage-

ment of Straddling Fish Stocks and Highly Migratory Fish Stocks.

The treaty was negotiated in response to concerns of over-capitalization of the world's fishing fleets at the United Nations Conference on Environment and Development during the Rio Summit in July 1992. The Conference acknowledged that problems such as fishing by nations operating outside international rules and the inability to enforce fishery laws were contributing to the further decline of fish stocks. Subsequently, the U.N. General Assembly organized the Conference on Straddling Fish Stocks and Highly Migratory Fish Stocks to negotiate a binding international agreement to ensure the long-term conservation and sustainable use of high seas fisheries and to improve cooperation between coastal and high seas fishing nations.

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#### **4. International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing (IPOA-IUU).**

The 24th biennial meeting of the United Nations Food and Agriculture Organization ("FAO") Committee on Fisheries ("COFI"), February 26–March 2 in Rome, approved by consensus the International Plan of Action to Prevent, Deter and Eliminate Illegal, Unregulated and Unreported Fishing ("IPOA"). The United States viewed the adoption of the IPOA as among the most significant accomplishments in the biennial meeting because it will be a useful tool in addressing some of the most intractable problems affecting ocean fisheries, particularly the activities of fishing vessels flying "flags of convenience." Ambassador Sichan Siv, U.S. Representative on the UN Economic and Social Council, in a statement to the General Assembly on Oceans and Law of the Sea on November 27, 2001 welcomed the imminent entry into force of the Agreement on Straddling Fish Stocks and Highly Migratory Fish Stocks, discussed above, and commented on the FAO action as set forth below.

The full text of Ambassador Siv's Statement is available at [www.un.int/usa/01\\_184.htm](http://www.un.int/usa/01_184.htm).

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A second element of this system of instruments that bears special mention is the recently adopted FAO International Plan of Action to deter, prevent, and eliminate illegal, unregulated and unreported (IUU) fishing. The United States is working on the development of its national plan of action on IUU fishing. We encourage other governments to do the same, if possible before the 2003 meeting of the FAO Committee on Fisheries. The four FAO International Plans of Action, including the IUU fishing plan, have all been adopted pursuant to the FAO Code of Conduct for Responsible Fisheries. Both fishermen and the environment would benefit from a wider application of their provisions.

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## 5. Salvage at Sea

### ***a. Protection of United States Government vessels, aircraft and spacecraft***

#### *(1) Policy on protection of sunken warships and other state craft*

On January 19, 2001, President William J. Clinton issued a statement of United States policy concerning sunken United States Government vessels, aircraft and spacecraft ("State craft"). 37 WEEKLY COMP. PRES. DOC. 195-196 (Jan. 22, 2001).

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Thousands of United States Government vessels, aircraft, and spacecraft ("State craft"), as well as similar State craft of foreign nations, lie within, and in waters beyond, the territorial sea and contiguous zone. Because of recent advances in science and technology, many of these sunken Government vessels, aircraft, and spacecraft have become accessible to salvors, treasure hunters, and others. The unauthorized disturbance or recovery of these sunken State craft and any remains of their crews and passengers is a growing concern both within the United States and internationally. In addition to deserving treatment as gravesites, these sunken State craft may contain objects of a sensitive national security, archeological, or historical nature. They often also contain unexploded ordnance that could pose a danger to human health



and the marine environment if disturbed, or other substances, including fuel oil and other hazardous liquids, that likewise pose a serious threat to human health and the marine environment if released.

I believe that United States policy should be clearly stated to meet this growing concern.

Pursuant to the property clause of Article IV of the Constitution, the United States retains title indefinitely to its sunken State craft unless title has been abandoned or transferred in the manner Congress authorized or directed. The United States recognizes the rule of international law that title to foreign sunken State craft may be transferred or abandoned only in accordance with the law of the foreign flag State.

Further, the United States recognizes that title to a United States or foreign sunken State craft, wherever located, is not extinguished by passage of time, regardless of when such sunken State craft was lost at sea.

International law encourages nations to preserve objects of maritime heritage wherever located for the benefit of the public.

Those who would engage in unauthorized activities directed at sunken State craft are advised that disturbance or recovery of such craft should not occur without the express permission of the sovereign and should only be conducted in accordance with professional scientific standards and with the utmost respect for any human remains.

The United States will use its authority to protect and preserve sunken State craft of the United States and other nations, whether located in the waters of the United States, a foreign nation, or in international waters.

*(2) Archeological research permits on Department of Navy ship and aircraft wrecks*

Earlier, the Department of the Navy, Department of Defense, had published a final rule setting forth application guidelines for archeological research permits on ship and aircraft wrecks under the jurisdiction of the Department of the Navy. 65 Fed. Reg. 31079 (May 16, 2000). These guidelines apply to all ship and aircraft wrecks whether submerged or on land,

including wrecks outside U.S. territory. 32 CFR Part 767 (2000). The applicable international law and policies in the guidelines are set forth in the excerpts from the Federal Register notice below.

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### **Custody and Management of [Department of Navy (“DON”)] Ship and Aircraft Wrecksites**

a. DON ship and aircraft wrecks are government property in the custody of DON. These seemingly abandoned wrecks remain government property until specific formal action is taken to dispose of them. DON custody of its wrecks is based on the property clause of the U.S. Constitution and international maritime law, and is consistent with Articles 95 and 96 of the Law of the Sea Convention. These laws establish that right, title, or ownership of Federal property is not lost to the government due to the passage of time. Department of the Navy ships and aircraft cannot be abandoned without formal action as authorized by Congress. Aircraft and ships stricken from the active inventory list are not considered formally disposed of or abandoned. Through the sovereign immunity provisions of admiralty law, DON retains custody of all its naval vessels and aircraft, whether lost in U.S., foreign, or international boundaries.

b. Divers may dive on DON wrecks at their own risk; however, Federal property law dictates that no portion of a government wreck may be disturbed or removed. The DON strongly encourages cooperation with other agencies and individuals interested in preserving our maritime and aviation heritage. Diving on sunken DON ships and aircraft located in units of the national park system or the national marine sanctuary system may be prohibited unless authorized by a Federal land manager.

c. The diving public is encouraged to report the location of underwater ship and aircraft wrecksites to the NHC [Naval Historical Center]. Documentation of these wreck locations allows the DON to evaluate and preserve important sites for the future. Under no circumstances will salvage of DON aircraft or ship-

wrecks be undertaken without prior and specific written approval by the NHC.

d. Wrecksites that are not entire aircraft or ships, but are parts strewn in a debris field, are considered potential archeological sites. Such sites still contain DON property and must be managed by the DON in accordance with the NHPA [National Historical Preservation Act of 1966 as amended (NHPA), 16 U.S.C. 470 (1999)], the Secretary of the Interior's Standards and Guidelines on Archeology and Historic Preservation, 48 FR 44716 (1983), and departmental regulations. Permits for recovery of DON ship or aircraft wrecks will be considered only for educational or scientific reasons. It is unlikely DON will recommend the disposal and sale of a DON ship or aircraft wreck that is eligible for listing on the National Register of Historic Places. The DON maintains a policy of not disposing of wrecked ships and aircraft for the following reasons:

1. Congress has mandated through the NHPA that DON make every effort to preserve its historic cultural resources;
2. The remains of crewmembers, if any, deserve respect and should remain undisturbed unless proper retrieval and burial become necessary;
3. There is a possibility that live explosives or ordnance may still be associated with the vessel or aircraft;
4. The arbitrary disposal and sale of wrecks may foster commercial exploitation of cultural resources and;
5. The abandonment of wrecks could deplete a finite inventory of significant cultural resources.

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### (3) *Crash of U.S. Air Force C-141*

In 1997 a United States Air Force C-141, with nine airmen on board, returning from delivering demining equipment to the Namibian Defense Force, and a German Tupalov 154 with 24 people on board collided in midair and went down off the coast of Namibia. In December 2000 Namibian fishing boats recovered debris from an area that falls within the estimated debris field of the crash, based on the original search and

rescue effort report. On October 10, 2001, at the request of the United States, the Government of Namibia issued a Marine Notice to protect the crash site by declaring it a sea grave, requesting fishermen and fishing vessels to provide assistance and information and requesting the media to voluntarily desist from covering recovery of personal effects. A letter, set forth below, from the U.S. Charge d'affaires to the Namibian Minister of Foreign Affairs in May 2001, explained the interest of the United States.

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With your kind consideration, I have the privilege of returning to your attention the U.S. Embassy's request of January 8, 2001 to the Namibian Government regarding the underwater resting place of the U.S. Air Force C-141 and its nine airmen. I understand that you had an opportunity to discuss this matter with Secretary of State Powell during your recent meeting. As related by Secretary Powell, the U.S. Government requests that the Government of Namibia issue a Notice to Mariners indicating the location of the crash site and debris field, and asking that mariners who inadvertently retrieve wreckage notify appropriate Namibian authorities. According to the U.S. Air Force, the accident site was Latitude S 18 degrees 48 minutes, Longitude E 11 degrees 02 minutes, and the estimated debris field boundaries are from Latitude S 18 degrees 40 minutes to S 18 degrees 54 minutes, and from Longitudes E 11 degrees 00 minutes to E 11 degrees 23 minutes.

Please be assured that the United States Government is not suggesting that Namibia bar fishing over areas of the seabed over which wreckage exists or may possibly drift. Rather our aim is to advise that certain fishing activities may risk desecrating a gravesite of U.S. service members. At the same time, fishermen in the area should be made aware of the danger to their fishing gear that might snag debris on the sea floor.

. . . Please convey to the President that the U.S. Government is requesting a one-time Notice to Mariners based upon the currently estimated debris field boundaries, as defined above. The United States has no intention to reassess the debris field nor request modification of the requested Notice to Mariners subsequent to its agreed parameters.

The Embassy is prepared to discuss with the Government of Namibia the size of the area to be covered under the Notice to Mariners. While the originally defined debris field of 14 miles by 23 miles would be ideal from our point of view, it is not a requirement. Our primary interest lies in the benefits—symbolic, humanitarian and practical—of alerting mariners to the location of the site where U.S. service members lost their lives.

\* \* \* \*

**b. UNESCO Convention on the Protection of Underwater Cultural Heritage**

The United Nations Educational, Social and Cultural Organization (“UNESCO”) at its 31st General Conference in Paris, France, voted on November 2, 2001, to adopt a Convention on the Protection of Underwater Cultural Heritage, 41 I.L.M. 37 (2002). The United States worked with other countries to attempt to negotiate amendments that would address some U.S. concerns and would have made the Convention more broadly acceptable, without success. Although the United States is an observer in UNESCO and has no vote, Robert C. Blumberg, U.S. Observer Delegate, made a statement on October 29, 2001, setting forth U.S. concerns, excepted below.

The full text of the U.S. Statement is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

- 
- The United States has actively participated in, and supported in many ways, the UNESCO negotiations on the development of a multilateral instrument to protect underwater cultural heritage.
  - The United States believes the draft Convention reflects substantial progress in certain important areas, notably the annexed rules, the preamble, and most of the general principles.
  - At the same time, the United States wishes to register our serious concern that there is no consensus on other key provisions, and therefore, the convention is not ready for adoption. We note with regret that the largest group of States refused to participate in informal consultations convened at the sugges-

tion of the Director General last week that could have resulted in acceptable compromises on the remaining outstanding issues.

- These issues include article 2(11), article 3 on the relationship with the UN Law of the Sea Convention (UNCLOS), the reporting scheme in article 9, the protection scheme in article 10, and the warships provisions in articles 7 and 10.
- In some cases, these provisions are unsatisfactory because they create new rights for coastal states in a manner that could alter the delicate balance of rights and interests set up under UNCLOS. This is the case with Article 9(1)(b)(i), which requires a flag State to give direct prior notification to a coastal State of any activity to be directed at [Underwater Cultural Heritage (“UCH”)] in its exclusive economic zone [“EEZ”] or on its continental shelf. It is also the case with the protection scheme set out in article 10, which creates a right of the coastal state, acting as the “coordinating State,” to take unspecified and apparently unlimited protection measures to prevent immediate danger to UCH located in its EEZ or on its continental shelf. Of particular concern is the fact that the coastal state may take such protection prior to consultations with the other States on whose behalf it is intended to be coordinating. Moreover, the protection measures are expressly not limited to dangers caused by “activities directed at UCH” but rather are extended to any danger “whether arising from human activities or any other cause.”
- In other cases, the provisions of the text are unsatisfactory because they are ambiguous.
- Article 3 is inadequate to resolve the concerns over jurisdiction and ambiguities in the text, because it includes a vague reference to international law in addition to UNCLOS. Nevertheless, we assume other delegations share the view that such ambiguous provisions must be interpreted in a manner consistent with international law:
- For example, Article 9(1)(b)(ii) can only be read as an obligation on flag States in regard to its own nationals and flag vessels.
- Similarly, Article 10(2) can serve only to restate the rights that states already have, as provided in UNCLOS parts V and VI, over the protection of natural resources; it cannot be read to create new rights over such resources.

- Article 2(11), which was added by a dubious procedure after the debate had concluded in July, also must be read in a manner that does not preclude a challenge to a state's excessive maritime claims based on the provisions of the convention.
- Finally, the provisions of the convention can only be applied as among Parties to the Convention, and as among the nationals and vessels of such Parties. This is true of article 10 and 12 in particular.
- The United States is very concerned that the provisions of the convention in regard to State vessels and aircraft are also inadequate, because they do not provide a regime under which the flag State must consent before its vessels can be the subject of recovery. The text places objectionable new restrictions on existing rights of flag States and creates new coastal State rights regarding such vessels located in the exclusive economic zone and on the continental shelf. The text does not provide for appropriate treatment and adequate protection of such vessels, many of which contain the remains of men and women who died in the service of their country.
- The United States notes that only a broadly ratifiable agreement will actually contribute to the goal we all share: the protection of UCH. We, therefore, hope there will be a future opportunity to revisit these provisions, so that we can build on the progress that has been made in regard to the Rules, the Preamble and other provisions that have commanded consensus.
- But, because of the serious concerns noted above the United States opposes adoption of the draft Convention in its present form.

**c. *Research, exploration and salvage of RMS Titanic***

On April 12, 2001, the National Oceanic and Atmospheric Administration, Department of Commerce ("NOAA") issued final guidelines for future research on, exploration of, and if appropriate, salvage of RMS Titanic. 66 Fed. Reg. 18905 (April 12, 2001). In keeping with the RMS Titanic Maritime Memorial Act of 1986, 16 U.S.C. § 450rr, et seq., the guidelines, which are non-binding, were developed in consultation with other interested countries and with consideration for public interests. Other countries included the United Kingdom (because

the Titanic was a UK-flag vessel), France (which helped to locate the wreckage), and Canada (off whose coast the wreckage was found). Excerpts from the Federal Register Notice of the final guidelines and the General Principles of the guidelines are provided below.

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\* \* \* \*

SUPPLEMENTARY INFORMATION: These final guidelines are issued under the authority of the RMS Titanic Maritime Memorial Act of 1986 (Act). Section 5(a) of the Act directs the National Oceanic and Atmospheric Administration (NOAA) to enter into consultations with the United Kingdom, France, Canada and others to develop international guidelines for research on, exploration of, and if appropriate, salvage of *RMS Titanic*. The guidelines are to (1) be consistent with the national and international scientific, cultural, and historical significance of *RMS Titanic* and the purposes of the Act, and (2) promote the safety of individuals involved in such operations.

The purposes of the Act are to: (1) Encourage international efforts to designate *RMS Titanic* as an international maritime memorial to those who lost their lives aboard the ship in 1912; (2) direct the United States to enter into negotiations with other interested nations to establish an international agreement that provides for designation of *RMS Titanic* as an international maritime memorial, and protects the scientific, cultural, and historical significance of *RMS Titanic*; (3) encourage, in those negotiations or in other fora, the development and implementation of international guidelines for conducting research on, exploration of, and if appropriate, salvage of *RMS Titanic*; and (4) express the sense of the United States Congress that, pending such international agreement or guidelines, no person should physically alter, disturb, or salvage *RMS Titanic*.

The Act directs NOAA to consult with the Secretary of State (DOS) and promote full participation by other interested Federal agencies, academic and research institutions, and members of the public with respect to how exploration and research should be conducted, and whether and under what conditions salvage of



*RMS Titanic* should occur. NOAA and DOS have consulted with representatives of these interested groups in the course of developing these guidelines.

Section 6 of the Act directs DOS to enter into negotiations with the United Kingdom, France, Canada and other nations to develop an international agreement that provides for: (1) Designation of *RMS Titanic* as an international maritime memorial; and (2) research on, exploration of, and if appropriate, salvage of *RMS Titanic* consistent with the international guidelines developed pursuant to the purposes of the Act. The final guidelines are consistent with the draft rules annexed to the January 5, 2000 draft international agreement that has been negotiated by the U.S., Canada, France and the United Kingdom.

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## I. General Principles

1. The preferred policy for the preservation of *RMS Titanic* and its artifacts is *in-situ* preservation. Recovery or excavation aimed at *RMS Titanic* and/or its artifacts should be granted only when justified by educational, scientific, or cultural interests. All artifacts recovered from *RMS Titanic* should be conserved and curated consistent with these guidelines and kept together and intact as project collections.

2. Activities should avoid disturbance of human remains. In particular, entry into the hull sections of *RMS Titanic* should be avoided so that they, other artifacts and any human remains are not disturbed.

3. Activities utilizing non-destructive techniques and non-intrusive surveys and sampling should be preferred to those involving recovery or excavation aimed at *RMS Titanic* and/or its artifacts.

4. Activities should have the minimum adverse impact on *RMS Titanic* and its artifacts.

5. Activities should ensure proper recording and dissemination to the public of historical, cultural and archaeological information.

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## 6. Rights and Freedoms of International Community in Navigation

### *Navigation and other maritime rights*

#### (1) *U.S. military survey operations in East China Sea*

On October 28, 2001, a U. S. naval vessel, the USNS Bowditch, was engaged in collecting military survey data in the West Sea approximately 26 nautical miles from the South Korean Coast and thus within the Republic of Korea ("ROK") exclusive economic zone ("EEZ"). Bowditch was approached by an ROK Navy patrol ship requesting country of registry, mission of the ship, point of origin, point of destination and length of stay in Korean waters. In response, Bowditch only supplied its name and country of registry. The ROK contacted the U.S. Embassy in Seoul stating that Bowditch appeared to have conducted marine scientific research in the ROK's EEZ without prior permission and that Bowditch had declined to clarify its mission. In response, the United States provided the following explanation of its lawful presence in the EEZ.

\* \* \* \*

— In response to your inquiries regarding the activities of USNS Bowditch, a U.S. naval auxiliary vessel, in your exclusive economic zone (EEZ) on October 28, 2001, I have been asked to inform you that USNS Bowditch was conducting a military survey and that its operations in the ROK EEZ were therefore fully consistent with customary international law, as reflected in the United Nations Convention on the Law of the Sea (LOS Convention).

— USNS Bowditch's mission during this time period was to collect military survey data off the coasts of various states in the East and South China Seas for military purposes. The purpose of these military surveys is to support peace and security in the Asia-Pacific region, an issue in which we believe the ROK and the U.S. share a common interest.

— International law allows all nations to conduct military surveys in another nation's EEZ. These surveys are considered to be military activities and as such can be undertaken in the EEZ of a coastal state without prior notification to or consent of the coastal state.

— We agree that a coastal state may require prior permission before anyone conducts marine scientific research (MSR) in its EEZ. However, military survey activities are not MSR. Rather, they are an internationally lawful military use of the seas related to the high seas freedom of navigation in the EEZ guaranteed to all nations under international law.

— With regard to the Bowditch's response to the query of the ROKN vessel, the U.S. Navy does not disclose the specific nature of its operations when exercising its high seas freedom of navigation. Only general information will be provided in response to a query or challenge.

— We would like to reach a shared understanding with you on this issue. However, we must emphasize that our military survey operations are consistent with international law and are conducted worldwide on that basis. In this regard, the United States has conducted military surveys in more than 85 different EEZs, without notice to or consent of the coastal states. We plan to continue our worldwide military survey activities, including those of the USNS Bowditch, accordingly.

— Should your experts desire further information, our experts are available for discussion if you wish.

\* \* \* \*

## (2) *Possible civil nuclear sea shipments through Arctic*

Press reports early in 2001 raised the possibility that Russia might propose to use an Arctic route for the first time to ship radioactive materials between Western Europe and Japan. The United States understands that any discussions of such transport remain at a very early stage and that decisions by the states involved are unlikely to be taken in the near future. On March 2, 2001, the United States provided its views on the applicable legal framework if such shipment were to be seriously considered.

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. . . While a number of states, including the United States itself, rely extensively on sea transport of nuclear materials, the inter-

national focus in recent years has been on sea shipments of nuclear material in connection with Japan's highly-developed civilian nuclear fuel cycle, which involves frequent shipments of radioactive materials between Japan and Western Europe. This focus is explained in large measure by the opposition of certain anti-nuclear groups to Japan's use of plutonium, recovered through reprocessing of its spent nuclear power reactor fuel, in fresh fuel for its civil nuclear power program. Shipments of nuclear materials other than plutonium are essentially a target of opportunity because of their relationship to the civil plutonium use.

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## The USG Perspective

### A. Law of the Sea

. . . Customary international law, as reflected in the United Nations Convention on the Law of the Sea (UNCLOS) provides, *inter alia*, that:

(i) The right of innocent passage in a state's territorial sea may not be denied, hampered or impaired. Prior notice and/or consent is not required. (Article 24.)

(ii) The right of transit passage through international straits may not be denied, hampered or impaired. (Articles 42 and 44.)

(iii) The right of archipelagic sea lanes passage may not be denied, hampered, or impaired. (Article 54.)

(iv) In the EEZ, a coastal State has sovereign rights over living and non-living resources and jurisdiction with regard to the protection and preservation of the marine environment. But such rights and jurisdiction must be exercised with due regard for the high seas freedoms of other States in the EEZ. (Article 56.)

In view of these principles, the USG would take the position that any ship traversing the Northeast Passage that is operating in compliance with the relevant international rules and standards for the carriage of radioactive material would have high seas freedom of navigation in the EEZ of coastal states including the United States, a right of transit passage through international straits (such

as the Bering Strait), and a right of innocent passage through the territorial sea of coastal states including the United States.

## **B. U.S.-Japan Agreement for Peaceful Nuclear Cooperation**

. . . Under the U.S.-Japan Agreement for Peaceful Nuclear Cooperation, the United States has given advance, long-term (“programmatic”) approval for the retransfer to France and the UK for reprocessing of Japanese spent fuel subject to the Agreement. (The U.S. right of approval arises because the uranium was originally supplied to Japan by the United States.) The United States has also given programmatic approval under the U.S.-Euratom Agreement for Peaceful Nuclear Cooperation for the retransfer from Euratom to Japan of the recovered plutonium, including plutonium in fabricated [mixed plutonium/uranium oxide (“MOX”)] fuel, subject to stringent physical protection measures set out in a transportation plan that must be reviewed (although not “approved”) by the United States. Within certain generic constraints (e.g., “to avoid areas of natural disaster or civil disorder and to ensure . . . security”), the choice of route is up to Japan and its European partners. There is no provision in the U.S.-Japan Agreement or the U.S.-Euratom Agreement that would in principle preclude use of the Northeast Passage.

. . . The situation with respect to the [vitrified high level radioactive waste (“VHLW”)] is different in significant respects, but comes down to the same conclusion—no U.S. right to determine the choice of route. The residual nuclear material in the VHLW is considered “practically irrecoverable,” and has been removed both from [International Atomic Energy Agency (“IAEA”)] safeguards and from coverage by the U.S.-Euratom and U.S.-Japan agreements for peaceful nuclear cooperation. Other than informally consulting to obtain assurances that the shipments are in accordance with IAEA and International Maritime Organization (IMO) safety standards, the United States has played no role in the VHLW shipments. In a test of the U.S. view that it has no legal responsibilities for the VHLW shipments, environmental groups filed suit in U.S. District Court in San Juan in early 1998, asking that the USG be ordered to prevent the shipment of VHLW through the Mona Passage between Puerto Rico and the Dominican

Republic. The USG argued that it exercised no control over the shipments, and that under the law of the sea the vessels enjoyed transit rights. In February 1999 the District Court granted the USG's motion for summary judgment and dismissed the suit. That action was upheld by the First Circuit Court of Appeals in December 1999.

. . . U.S. experts regard the environmental and safety risks of shipments of all the above materials as negligible, given the existing exceedingly stringent packaging arrangements (including containment of the nuclear material in specially-designed casks—massive structures with walls of 10-inch thick forged steel that have been subjected to rigorous testing and certification procedures to ensure compliance with exacting international standards); the use of transport ships with multiple redundant safety, navigation and communications systems; and the safe record of many previous shipments. Adequate physical protection measures, including use of armed escort vessels, ensure against any proliferation risk when plutonium is transferred. There is no proliferation risk for the VHLW, which contains only a small amount of fissile material that is “practically irrecoverable,” nor for the spent fuel, which because of its physical form is either “self-protecting” or of low enrichment value for the uranium-235 isotope.

. . . While the direct U.S. role varies, as just noted, according to the type of Japanese nuclear material transported, organized opposition to any of these shipments has negative implications for important U.S. interests. These include freedom of navigation by U.S. nuclear-powered warships, and shipments of radioactive materials for U.S. purposes or under U.S. auspices. Examples of the latter include acceptance of U.S.-origin foreign research reactor highly-enriched uranium (HEU) spent fuel for non-proliferation reasons (the Foreign Research Reactor Spent Nuclear Fuel Acceptance Program) and shipments of nuclear material in furtherance of programs for dismantling excess Russian and U.S. nuclear weapons.

. . . If interest in use of the Northeast Passage intensifies, U.S. experts will expect to hold detailed discussions with counterparts in other countries to address issues such as whether arctic conditions pose risks not encountered on traditional routes and therefore not contemplated in the development of the existing IMO and IAEA standards, and whether the capabilities of the trans-

port ships will be sufficient to deal with any such additional risks. The USG will also remain sensitive to views held locally in Alaska, as well as by the Alaska congressional delegation in Washington. It was Alaska Senator Murkowski who in 1987 sponsored legislation bearing on some of the shipments of nuclear material under discussion here. Specifically, the "Murkowski Amendment" to the Omnibus Budget Reconciliation Act of 1987 (section 5062 of P.L. 100-203) established stringent criteria for the certification of a container for air shipment of plutonium through U.S. air space from one foreign nation to another (thus requiring that a new cask standard be met before a polar air route can be employed for shipments of plutonium from Europe to Japan). The "Murkowski Amendment" also directed the President to seek arrangements with the GOJ for sea shipment as an alternative. At the same time, the USG must carefully avoid any suggestion that it distinguishes between maritime freedoms over more traditional routes and maritime freedoms on routes where the United States may be more directly a coastal state.

. . . As noted, we believe that discussions regarding use of the Northeast Passage for sea transport of nuclear materials remain at a very early stage and that decisions by the states involved are unlikely to be taken in the near future.

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(3) *Surveillance activities and emergency landing by U.S. aircraft on Hainan Island, People's Republic of China*

On April 1, 2001, a United States EP-3 aircraft, with 24 crew members aboard, was forced to make an emergency landing on Hainan Island, People's Republic of China ("PRC"), following a midair collision with a PRC F-8 aircraft. The U.S. EP-3 was a reconnaissance aircraft operating outside of Chinese territorial airspace over international seas. The PRC protested both the operation of the reconnaissance mission and the emergency landing without express permission from the Chinese Government as contrary to international law. On April 15, 2001, China provided an explanation of its legal views in a signed article in its official party newspaper, *Xinhua*.

The United States prepared a response to the legal positions taken in that article. The contents of the response are provided below.

On April 12, 2001, the crew of the aircraft were allowed to depart the PRC. The plane was returned to the United States, in sections, on July 3, 2001.

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Article 58(3) of the Law of the Sea (“LOS”) Convention provides that a State, when exercising its freedom of overflight under the Convention in the EEZ, must have “due regard” to the “rights and duties” of the coastal State.

— Article 58(3) provides: “In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.”

— The “rights and duties” referred to in Article 58(3) relate to a very limited category of coastal State rights and duties in the EEZ elaborated in Article 56 of the LOS Convention, such as those relating to the exploitation of fisheries or oil/gas.

— Such rights do not include any rights that may be reflected in Article 301, which imposes an obligation on all states but does not accord any right particularly to coastal states. (See discussion below of section 301).

— Thus, a State would arguably violate the “due regard” obligation if its flag aircraft were, for example: aiding and abetting an illegal fishing operation in another State’s EEZ; or buzzing an oil platform in another State’s EEZ.

— The U.S. plane’s action in no way exhibited lack of due regard for China’s rights and duties with respect to its EEZ and, in fact, had no impact on any Chinese economic interests.

— The “rights and duties” of the coastal State do not, as implied by China, refer more broadly to all the interests, including security interests, of the coastal State.



— The Report of the Chairman of the Second Committee of the Third U.N Conference on the Law of the Sea (1976) stated that “[I]n simple terms, the rights to resources belong to the coastal State and, in so far as such rights are not infringed, all other States enjoy the freedoms of navigation and communication.” V United Nations, The Third United Nations Conference on the Law of the Sea, Official Records 153 (paragraph 18) (United Nations, 1976).

— A G-77 proposal in 1975 to include the coastal State’s security interests in the “residual rights” provision (now Article 59) was not accepted. II United Nations Convention on the Law of the Sea 1982, a Commentary 563 (Myron H. Nordquist ed., 1993).

— In consenting to be bound by the Convention, no State—including China—has asserted that Article 58(3) applies to its rights and duties other than those provided for in Part V on the EEZ.

— Therefore, China’s assertion that the overflight violated the law of the sea because it failed to respect China’s security interests is without merit.

— The obligation in Article 58(3) on the flag State to comply with the laws and regulations adopted by the coastal State in accordance with the provisions of the Convention would be the “null set” when it comes to overflight of aircraft, as the Convention does not give the coastal State rights to regulate overflight beyond the territorial sea (unless, perhaps, in the extremely limited instance where such regulation is related to EEZ resources—e.g., where an aircraft is aiding illegal fishing)(Footnote 1 below).

— Article 58(1) of the Law of the Sea (“LOS”) Convention specifically preserves for ships and aircraft in the Exclusive Economic Zone traditional high seas freedoms of navigation and overflight, which includes military activities, such as anchoring, launching and landing of aircraft, operating military devices, intelligence collection, exercises, operations and conducting military surveys.

— Even if the Chinese article were correct that Article 301 reflects a right that is incorporated into the rights of coastal States, which it is not, U.S. actions would not have violated the “due regard” obligation of Article 58.

— Article 301 states simply that, in exercising their rights under the LOS Convention, states “shall refrain from any threat or use of force against the territorial integrity or political inde-

pendence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”

— Conducting reconnaissance flights is not a use of force. Such flights are in fact common.

— Indeed, reconnaissance flights are conducted by other nations off the coast of the United States.

— Chinese Point:

The U.S. side accused the Chinese side of tracking and monitoring the U.S. military reconnaissance plane.

— U.S. Response:

We have not argued that China is prohibited from tracking and monitoring these flights.

— In undertaking such activities, however, China must act with “due regard” for those exercising their rights under the Convention, including the rights of the United States to conduct these flights. China’s “due regard” obligations can be found in:

— Article 56(2) of the LOS Convention, which states: “In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention;”

— And, in Article 58 of the Convention—when conferring on all States the freedom of overflight in the EEZ—confers the “freedoms referred to in article 87 of navigation and overflight.” The reference to article 87 incorporates by reference a freedom of overflight that is caveated by the due regard obligation in Article 87.

— The cause of this incident is attributable to the failure of the Chinese aircraft to operate with “due regard.”

— In this regard, there have been several instances over the last four months in which Chinese aircraft have maneuvered aggressively against our aircraft in international airspace (reference video).

— The U.S. was sufficiently concerned about the behavior of Chinese pilots that we lodged a formal protest that was delivered in Washington and Beijing on December 28. That protest, in part, called on China to “look into the matter and to prevent its recurrence and to ensure that all freedoms and rights under inter-

national law for the use of the sea and airspace are not infringed in the future.”

— If in the future Chinese aircraft undertake provocative or potentially threatening actions, or otherwise act without “due regard,” the U.S. reserves the right to take appropriate defensive measures.

— Chinese Point:

The US draws up an air defense identification zone in its own airspace over coastal waters that extends far beyond the 200-nautical-mile exclusive economic zone, and demands foreign planes entering the zone to follow routes specified by the U.S. (The article quotes American professor Frances Boyle saying that the US would not tolerate Chinese airplanes taking similar action in US coastal waters).

— U.S. Response:

The Air Defense Identification Zones (“ADIZ”) established under US regulations—which require the filing of flight plans and periodic position reports—apply only to aircraft bound for U.S. territorial airspace.

— The U.S. does not recognize the right of a coastal nation to apply its ADIZ procedures to foreign aircraft not intending to enter national airspace, and does not apply its ADIZ procedures to foreign aircraft not intending to enter U.S. airspace.

— Chinese Point:

The US plane entered China’s airspace without permission, seriously violating China’s territorial sovereignty. The U.S. did not ask for permission to enter China’s territorial airspace. Despite the fact that its telecommunications system was still operating, and the U.S. side had the time and capability to send a request, the U.S. failed to notify the Chinese or request permission for an emergency landing.

— U.S. Response:

The idea that aircraft in distress are entitled to special consideration is neither novel nor unfamiliar to the Chinese. For example, a 1996 [People’s Liberation Army] PLA Publication states: “When a military aircraft is forced to make an emergency landing or seek temporary shelter in foreign territory because of

bad weather or distress, such a landing should not be considered a violation of airspace.” (“Basis for International Law for Modern Soldiers (Dangdai Junren Guojifa Jichu), Chapter entitled “Military Aircraft’s Legal Status and Rights”). (Footnote 2 below).

— Our aircraft followed standard international procedures and broadcast numerous “mayday” calls over the international military distress frequency.

— Although we recognize that military aircraft normally require permission to enter the territorial airspace of another nation, international law recognizes a right of entry for foreign aircraft, state or civil, in circumstances such as these when such entry is due to distress and there is no reasonable safe alternative (Footnote 3 below).

— Notwithstanding the ordinary rules requiring consent, a peacetime right to enter in distress for military aircraft is consistent with established international practice.

— Such a right is clearly inferable both from analogous situations in which such a right exists (e.g., for civil aircraft under Article 25 of the Chicago Convention) and from basic humanitarian considerations.

— Indeed, as part of its effort to codify the international rules on state responsibility, the United Nations’ International Law Commission reviewed 20th Century practice in cases where emergency factors resulted in peacetime intrusions into another country’s airspace or territory without consent (1978 Yearbook of the International Law Commission, Vol. II at 102).

— The cases fall into two general categories: those in which the country intruded upon quickly recognized that the intrusion was caused by such factors, and those where the country contended that the intrusions were intentional as part of an effort to collect intelligence.

— Even cases in this latter category, however, appear to accept the premise that an aircraft’s crew should not be detained if the entry in fact resulted from distress.

— We also note that—while, as acknowledged in Ambassador Prueher’s letter to Foreign Minister Tang, the U.S. aircraft did not have “verbal clearance”—it is fair to infer implicit consent in the circumstances. Chinese authorities were aware that the aircraft was entering in distress and took no action to prevent or divert its entry or landing at Lingshui airfield

— Chinese Point:

The Chinese side absolutely could have taken necessary coercive measures.

— U.S. Response:

In these circumstances—having taken the action that resulted in the collision and being aware that the plane was entering in distress—“coercive measures” such as shooting down the entering plane would have constituted an outrageous reaction.

— We believe that China in fact acted appropriately to permit the plane to land.

— Chinese Point:

It is absurd to claim that the plane was a part of U.S. territory.

— U.S. Response:

Warships and aircraft have historically been accorded sovereign immunity by nations.

— As we understand it, it is in fact the Chinese Position that Chinese warships and military aircraft sailing or flying over the high seas or anchored in a foreign port “are considered to be part of Chinese territory (Footnote 4 below).”

— In any event, our views that the aircraft and crew acted properly and that the U.S. is entitled to the immediate return of the plane are not dependent on the plane being considered U.S. territory.

— Chinese Point:

A Recount of the Foreign Relations Act of the United States (third edition)—the most authoritative international law document of the United States—says that even the consent of the accepting state is insufficient to confer sovereign immunity on a foreign aircraft in the absence of a special agreement.

— U.S. Response:

The Chinese are apparently referring to the “Restatement of the Law (Third), The Foreign Relations Law of the United States.”

— The “Restatement” is in fact not an official USG document and we would not acknowledge it as “the most authoritative international law document of the U.S.”

— In any event, it is simply not apparent to us what in the Restatement the Chinese are referring to.

— It is possible the Chinese are referring to a reference in the introductory material preceding section 461, which states: “In

general, unless otherwise provided by special agreement, activities of a foreign state, whether they are ‘governmental’ or ‘commercial’ in character, are subject to local law, though as to the former the foreign state is immune from enforcement of that law by domestic courts, administrative bodies, or police action.”

— However, this passage would appear to hurt rather than help the Chinese argument, as it specifically contemplates that governmental activities are “immune from enforcement of that law by domestic courts, administrative bodies, or police action.”

— Another possibility is that the Chinese are referring to Reporter’s Note number 6 to section 513, which states that military and other state aircraft “enjoy overflight or landing rights only by special agreement.”

— This is of course the normal rule, but does not apply in the current circumstances for all the reasons cited above.

— Chinese Point:

The US must agree to stop similar encroachments, compensate for losses, ensure against occurrences of similar incidents, and make an apology.

— U.S. Response:

Each of these demands presumes that the U.S. acted wrongfully, and that is just not so.

## **7. *Legal Rebuttal Footnotes:***

— (Footnote 1) It should be noted that Article 11 of China’s “Exclusive Economic Zone and Continental Shelf Act” potentially violates this provision. Among other things, it conditions a foreign State’s overflight in the EEZ on the observance of the “laws and regulations” of China. To the extent that China purported to condition freedom of overflight on the observance of Chinese laws that went beyond China’s right to regulate in the EEZ as contained in the Convention (which, as noted above, is extremely narrow), China would be in violation of the Convention.

— (Footnote 2) “Basis for International Law for Modern Soldiers (Dangdai Junren Guojifa Jichu);” Chapter entitled “Military Aircraft’s Legal Status and Rights.”

— (Footnote 3) We recognize that there may be circumstances in which a state forbids a foreign aircraft from entering in distress, e.g., if it presents security risks. But there are no credible assertions here that the Chinese believed the US plane posed such risks, and in any event the Chinese had a special responsibility for the welfare of the plane because of their responsibility for causing the collision.

— (Footnote 4) This is reported to be China's position in an Oxford monograph study on China's practice on the Law of the Sea. See J. Greenfield, *Oxford Monographs in International Law, China's Practice in the Law of the Sea* (1992), p.114.

\* \* \* \*

#### *(4) Maldives excessive maritime claims*

The United States objected in a diplomatic note to the Government of Maldives ("GOM") that certain provisions of Maldives law were not in conformity with international law as reflected in the 1982 UNCLOS. The United States objections, concerning innocent passage in the territorial sea, high seas freedoms of navigation in the exclusive economic zone and the right of archipelagic sea lanes passage for military aircraft, as well as the drawing of certain archipelagic straight baseline segments, as set out in a telegram of June 21, 2001, are provided below.

The full text of the telegram is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

\* \* \* \*

The Government of the United States notes that article 13 of the Act requires prior authorization by the GOM before entry into the territorial sea of foreign warships, nuclear-powered ships and ships carrying any nuclear or other inherently dangerous or noxious substances. This requirement is inconsistent with international law.

The United States wishes to recall that customary international law, as reflected in Articles 17 to 26 and Article 52 of the

1982 United Nations Convention on the Law of the Sea (LOS Convention), provides that the ships of all States enjoy the right of innocent passage through the territorial sea of a coastal state as well as the archipelagic waters of an archipelagic state. Innocent passage is a navigational right that may be exercised without requirement to provide prior notification to or obtain permission from the coastal state. This right applies to all ships, regardless of flag, type, means of propulsion, cargo, destination, armament, or purpose of voyage. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal state. Passage is considered to be prejudicial to the peace, good order or security of the coastal state if a foreign ship engages in one of twelve specific activities listed in Article 19(2) of the 1982 Convention. Mere passage of a warship, nuclear-powered ship or ship carrying nuclear or other inherently dangerous or noxious substances is not included in the list of activities contained in Article 19(2).

The United States also wishes to recall that a coastal state may, consistent with international law, adopt laws and regulations relating to innocent passage to the extent such requirements do not hamper innocent passage or do not have the practical effect of denying or impairing the right of innocent passage. (Articles 21 and 24, LOS Convention).

The United States would additionally recall that the transport of nuclear or other inherently dangerous material is regulated by a number of international agreements, including the LOS Convention (Articles 22 and 23), the International Maritime Organization (IMO) code for the safe carriage of irradiated nuclear fuel, plutonium, and high-level radioactive waste on board ships, the IMO International Maritime Dangerous Goods Code, the Physical Protection Convention and the International Atomic Energy Agency (IAEA) Regulations for the Safe Transport of Radioactive Material. These provisions do not allow a coastal state to prohibit the innocent passage of such ships through the territorial sea or to condition such transit on prior notification or authorization.

The United States notes that Article 14 of the Act purports to require all “foreign vessels” to obtain the authorization of the GOM before entering the exclusive economic zone. This require-



ment is inconsistent with international law.

The United States wishes to recall that, within the exclusive economic zone, a coastal state has sovereign rights for the purpose of exploring, exploiting, conserving, and managing the living and non-living natural resources of the water column and the sea-bed and its subsoil. The coastal State also has jurisdiction with regard to the protection and preservation of the marine environment, marine scientific research and the establishment and use of artificial islands, installations and structures for economic purposes. However, a coastal state's rights and jurisdiction within the exclusive economic zone are subject to the rights and duties of other states as provided for in international law, including Article 58 of the 1982 Convention. The rights specifically preserved for the ships and aircraft of all states in the exclusive economic zone include the freedoms of navigation and overflight, and other internationally lawful uses of the sea related to those freedoms, without requirement to provide prior notification to or obtain the prior permission from the coastal state.

To the extent article 14 of the Act purports to condition freedoms of navigation and overflight, and other lawful uses of the sea related to those freedoms, in the Maldives exclusive economic zone on prior authorization, it is inconsistent with international law.

The United States also notes that Article 15 of the Act purports to limit overflight of the archipelagic waters of the Maldives by foreign military aircraft and to require prior authorization by the GOM. This requirement is also inconsistent with international law.

International law, as reflected in article 53 of the LOS Convention, provides that all ships and aircraft, including military aircraft, enjoy the right of archipelagic sea lanes passage over archipelagic waters and the adjacent territorial sea. This right may not be conditioned on a requirement to provide prior notification to or obtain prior permission from the archipelagic state. The right of archipelagic sea lanes passage may be exercised in accordance with international law through all routes normally used for international navigation. Archipelagic sea lanes passage means the exercise of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or EEZ and another part of the high seas or EEZ. The right of

archipelagic sea lanes passage cannot be hampered or suspended for any purpose. (LOS Convention, Articles 54, 44, 42)

Finally, the United States notes that in schedule 1 of the Act, thirty seven straight archipelagic baselines are defined by a listing of geographic coordinates. Three segments (14–15, 28–29, and 36–37) exceed 100 nautical miles in length. Under Article 47(2) of the LOS Convention, only up to three percent of the total number of a country's archipelagic baselines may exceed 100 nautical miles in length up to a maximum of 125 nautical miles. Thus, under international law, Maldives may only have one baseline that exceeds 100 nautical miles in length. However, these segments could be revised so as to meet the length requirements while remaining within the land to water ratios specified in article 47(1) of the LOS Convention.

Accordingly, the United States reserves its rights and the rights of its nationals in this regard.

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## **B. OTHER BORDER ISSUES: U.S.–MEXICO AGREEMENT ON DELIVERY OF RIO GRANDE WATER TO UNITED STATES**

On March 16, 2001, the United States and Mexico reached agreement based on recommendations by the International Boundary and Water Commission for the United States and Mexico, to reduce a deficit in the allocation of water to the United States from Mexican Rio Grande tributaries. The terms of the agreement were recorded in International Boundary and Water Commission Minute No. 307, which entered into force as a legally binding agreement upon an exchange of notes between the two governments on the same date. The obligations concerning border water allocation are based on the United States-Mexico Treaty Relating to the Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, and Supplementary Protocol, concluded November 14, 1944, entered into force November 8, 1945. 59 Stat. 1219, TS 994, 9 Bevans 1166, 3 U.N.T.S. 313. The Treaty is one of several concluded between the two countries to address equitable distribution of waters of the Rio Grande, which forms much of their 2,000 mile border. The Treaty allots to the United States one-third of the flow reaching the

main channel of the Rio Grande from six named Mexican tributary rivers, in an average amount of 350,000 acre-feet per year in cycles of five consecutive years. The Treaty provides further that in certain circumstances deficiencies existing at the end of a five-year cycle are to be made up in the following five-year cycle. Water deliveries from 1992–1997 ended with a deficit of 1.024 million acre-feet of water owed to the United States and deliveries in the current cycle are also well below the allocated amount.

A Statement released March 19, 2001 by the Department of State, excerpted below, described the agreement to address these deficiencies.

One of the means adopted for making up the water deficit assigns 100 percent of “unmeasured treaty tributary water” to the United States, rather than the 50% allocation set forth in the Treaty. At the end of 2001 this aspect of the agreement was under litigation in the Mexican courts and an *amparo* had been issued enjoining Mexico from providing these waters to the United States.

The Statement is available at [www.state.gov/r/pa/prs/ps/2001/1422.htm](http://www.state.gov/r/pa/prs/ps/2001/1422.htm).

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The United States and Mexico have agreed upon a framework to ensure that Mexico delivers to the United States 600,000 acre-feet of water in partial fulfillment of its obligation under the 1944 Treaty between the Government of the United States of America and the Government of the United Mexican States Relating to Utilization of Waters of the Colorado and Tijuana Rivers and of the Rio Grande, satisfying the instructions given during the recent meeting between President George W. Bush and President Vicente Fox in San Cristobal, Guanajuato, on February 16. Based on studies of both nations’ Sections of the International Boundary and Water Commission, the United States and Mexico adopted a framework that will permit Mexico to make water deliveries in partial satisfaction of its outstanding obligations under the 1944 Water Treaty. In this manner, the problem of the allocation of waters of the Rio Grande to the United States for this season has been resolved, and a basis has been established to resolve water deliveries to the United States in the medium and long term.

The discussions, held in Washington, D.C. March 16, 2001, included participation by high-level officials of the U.S. Department of State, Department of Interior, and Environmental Protection Agency and of Mexico's Secretariat of Foreign Relations, National Water Commission, and Secretariat of the Environment and Natural Resources, as well as the International Boundary and Water Commission, and took place in a spirit of friendship and cooperation that marks the bilateral relationship. In keeping with that spirit, the two governments also agreed to study jointly ways to identify measures of cooperation with respect to drought management and sustainable basin management.

### **C. OUTER SPACE**

The Legal Subcommittee of the United Nations Committee on the Peaceful Uses of Outer Space ("COPUOS") held its 40th session in Vienna from April 2–12, 2001. Excerpts below from statements of the United States delegation provide its views on the appropriate scope of the mandate of COPUOS and its Legal Subcommittee and the role of other organs in a variety of areas concerning outer space. These include equitable access to the geostationary orbit and associated frequencies and orbital debris; the importance of broader adherence to existing space law instruments and implementation of their terms; minimizing orbital debris; the new Space Equipment Protocol to the UNIDROIT Convention on International Interests in Mobile Equipment; and limitations on space advertising that could interfere with astronomy.

The full text of the U.S. Statements is available at [www.state.gov/s/l](http://www.state.gov/s/l). The Report of the 40th Session (U.N. Doc.A/AC.105/763) is available at [www.oosa.unvienna.org/repidx.html](http://www.oosa.unvienna.org/repidx.html).

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#### **1. General Exchange of Views**

In participating in the General Exchange of Views, Agenda Item 3, the United States covered many of these topics briefly. The excerpts here address several points that were not further elaborated under other Agenda Items, below.

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. . . Since its first session in May 1962, the Legal Subcommittee has formulated and adopted five major outer space treaties and several sets of international principles, producing a new branch of international law at a pace second to none. These treaties and principles provide the foundation for the orderly use of outer space for the benefit of all countries. Under this legal regime, space exploration by nations, international organizations and, now, private entities has flourished. As a result, space technology and services contribute immeasurably to economic growth and improvements in the quality of life around the world.

\* \* \* \*

Throughout its history the Committee has been characterized by the process of consensus and the desire and interest of member States to develop space law which promotes, not hinders, space exploration. This has led to achievements that are significant for any United Nations organization responsible for negotiating international law instruments.

Mr. Chairman, this record of success is also attributed to the fact that the Committee has been able to avoid being drawn into protracted debate on extraneous political issues. In this regard, we would like to remind delegates that from its inception, COPUOS was mandated to deal exclusively with international cooperation in the peaceful uses of outer space. The First Committee of the UN General Assembly, the UN Disarmament Committee and the Conference on Disarmament would be more appropriate multilateral fora to discuss arms control matters related to outer space.

Mr. Chairman, allow me call to the attention of delegates two other important milestones in the work of the Subcommittee. This year marks the 15th anniversary of the adoption of the Principles Relating to Remote Sensing of the Earth from Space and the 5th anniversary of the adoption of the Declaration on International Cooperation in the Exploration and Use of Outer Space for the Benefit and in the Interest of All States, Taking into Particular Account the Needs of Developing Countries. The Remote Sensing Principles established fundamental concepts that have helped expand civil and commercial use of remote sensing data to im-

prove natural resources management, land use and the protection of the environment. First, remote sensing satellite operators are free to collect data at any time of any part of the Earth. Second, such data is to be made available on a public non-discriminatory basis and on reasonable cost terms.

The Principles on Space Benefits elaborated on the basic concept of Article I of the 1967 Outer Space Treaty; that is the exploration and use of outer space shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development. The Principles made a lasting contribution to international space cooperation by establishing two basic considerations: 1) States are free to determine all aspects of their international cooperation, whether it is bilateral or multilateral or whether it is commercial or non-commercial and 2) States should choose the most effective and appropriate mode of cooperation in order to allocate resources efficiently.

\* \* \* \*

Mr. Chairman, we note that the Scientific and Technical Subcommittee ["STSC"] will consider international cooperation in limiting space advertising that could interfere with astronomy. The issue of obtrusive space advertising was discussed in the report of Unispace III and just this past year the US Congress indicated its support for an international agreement on prohibiting obtrusive space advertising. Congress has also directed the Federal Aviation Administration of the United States not to license any US commercial launch that would carry as its payload obtrusive space advertising. We would ask that delegations consider the possibility of adding this as a single issue item to our agenda for next year. The purpose of this item would be to have a one year discussion to define the legal aspects of the problem, in light of the work that will be done by the STSC at its next session and relevant international scientific organizations, as well as whether the topic deserves further attention in the subcommittee. In addition, relevant international organizations would be invited to submit reports to the LSC or make special presentations on this topic.

Mr. Chairman, with respect to the proposal of some delegations for the convening of an ad hoc informal open-ended working group to consider the appropriateness and desirability of

developing a universal comprehensive international space law: we note that the convening of an ad hoc group at this session was not agreed for the agenda of this session and that the formulation of such a group is not contemplated by the Subcommittee's practice or procedures. Moreover, we remain unconvinced that it is wise for this Subcommittee to take up this proposal in its current form or otherwise, in view of the General Assembly's direction that we seek to promote adherence with the existing treaties establishing the legal regime for outer space.

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## **2. Status of International Treaties Governing the Use of Outer Space**

As to Agenda Item 4, "Status of the International Treaties Governing the Use of Outer Space," the United States voiced its support of greater adherence given their demonstrated utility.

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. . . [T]he overall sense of my government is that the space law treaties continue to function well in today's increasingly complex environment. For example, the United States has recently been working with other governments concerned to address in an orderly and amicable way two cases requiring application of the Outer Space Treaty and the 1968 Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space. Both situations involved space objects of U.S. origin that ended up on the territories of South Africa and Saudi Arabia, respectively. In both cases, the treaties provided an effective framework to deal with the situation cooperatively.

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## **3. Activities of International Organizations**

Concerning Agenda Item 5, Information on the Activities of International Organizations, the United States Statement provided the U.S. views as follows.

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. . . My government called for members of international organizations to consider steps they could take to encourage wider adherence to the Outer Space Treaty and to the Liability and Registration Conventions so as to make it possible for the organizations to accept the principles of the Conventions.

International organizations that carry on space activities have the opportunity to accept the principles of the Liability and Registration Conventions. The core articles of the Liability and Registration Conventions can be deemed to apply to an international intergovernmental organization which conducts space activities. Two requirements must be met, however. (Liability Convention, Article XXII(1); Registration Convention, Article VII(1).) The organization must declare its acceptance of rights and obligations under the Convention *and* the majority of the members of the organization must have adhered to both the Outer Space Treaty and to either the Liability or Registration Convention, as the case may be.

As a result of the latter condition, several extremely important intergovernmental organizations conducting space activities remain unable to elect to bring those activities into the frameworks of the Liability and Registration Conventions because not enough of their members have adhered to both the Outer Space Treaty and either the Liability or Registration Convention. The result is a potentially significant gap in the coverage of key treaties.

We again encourage any organizations that may be in this position, and their members, to consider taking steps to remedy this problem. We believe that doing so could produce a useful improvement in the coverage and effectiveness of two of the most important space law treaties. We would welcome clarification as to what steps these organizations are already taking to address this problem.

#### **4. Definition and Delimitation of Outer Space and the Character and Utilization of the Geostationary Orbit**

In response to Agenda item 6, the United States elaborated on its views concerning the Definition and Delimitation of



Outer Space and the Character and Utilization of the Geostationary Orbit as follows.

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With respect to the question of the definition and delimitation of outer space, we have examined this issue carefully and have listened to the various statements delivered at this session. Our position continues to be that defining or delimiting outer space is not necessary. No legal or practical problems have arisen in the absence of such a definition. On the contrary, the differing legal regimes applicable in respect of airspace and outer space have operated well in their respective spheres. The lack of a definition or delimitation of outer space has not impeded the development of activities in either sphere.

We have not been persuaded by the reasons put forth for undertaking such a definition or delimitation. . . . [Some] delegations suggest that a definition or delimitation is somehow necessary to safeguard the sovereignty of states. However, we are aware of no issue of state sovereignty that would be solved by defining outer space.

Even if there were a problem the resolution of which a definition or delimitation of outer space would help to address, the Legal Subcommittee should still proceed with all due caution. Whatever definition or delimitation were ultimately agreed upon would by its nature be arbitrary at worst, or, at best, be constrained by the current state of technology. For example, technological advances have increased the height at which aircraft can sustain flight, while they have decreased the height at which the orbital flight of space vehicles is possible. These technological advances will likely continue. It would be dangerous for the Legal Subcommittee to agree to an artificial line between air space and outer space, when it cannot predict the consequences of such a line.

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Turning to the issue of the geostationary orbit, or GSO, first, the United States remains committed to equitable access to the GSO by all States as well as to the need to satisfy the real requirements of developing countries for GSO use and outer space

telecommunications generally. Proper management of the GSO in these regards is best done through the [International Telecommunications Union (“ITU”)].

The ITU is the international body that is charged by the international community with the rational, efficient and economic use of radio frequencies and the GSO. The question of ensuring equitable access to the geostationary orbit is a matter that the ITU has been squarely, vigorously, and satisfactorily addressing for a number of years. Moreover, we believe the ITU Constitution, Convention and Radio Regulations, and the mechanisms under those authorities for international cooperation among countries and groups of countries, takes into account the interests of states in the use of the geostationary orbit and the radio frequency spectrum.

Second, the United States cannot agree with those that argue that the GSO is or can be subjected to the sovereignty of States or that States may have preferential rights to the use of such orbits. We remain committed to the position that because this orbit, at approximately 36,000 kilometers above the earth, is in outer space, its use is governed by the 1967 Outer Space Treaty. As you know the Outer Space Treaty provides in Article I that “Outer space . . . shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law. . . .” Article II of this Treaty further states that outer space is not subject to national appropriation by claim of sovereignty or by any other means. Thus, a signatory to this Treaty cannot appropriate a position in the GSO either by claim of sovereignty or by means of use, or even repeated use, of such an orbital position.

## **5. Space Equipment Protocol**

The UNIDROIT Space Equipment Protocol to the Convention on International Interests in Mobile Equipment and Protocol was the subject of Agenda Item 8, on which the United States commented as set forth below. *See also* Chapter 15.A.2.a.

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We would like to commend the Secretariat for its work together with UNIDROIT on the report to the Committee (A/AC.105/

c.2/l.225) on the proposed UNIDROIT convention system for international financing of mobile equipment, and the draft Space Equipment Protocol to that convention. We welcome the opportunity to set forth our views on this agenda item, because we believe it has considerable potential to facilitate the development of commercial activities in outer space, which in turn will benefit states in all regions and all levels of economic development.

The UN space law regime has successfully put in place a framework for the conduct of activities in space. In the funding area, however, the picture has changed substantially since the treaties were negotiated, largely with regard to development of commercial activities in space and the parallel need to replace government funding for space activities.

Government funding for space ventures has steadily declined, and new commercial activities in space can no longer rely on high-cost "venture" capital, until recently the primary method by which non-government funded activities could be undertaken. New methods in commercial finance can fill this funding gap; as a practical matter, this will require a specific treaty basis for this proposed new financing method. Availability of general funding sources is important not only for the development and placement in orbit of satellite facilities but also for the financing of services which may be sought by all states, whether or not they have a direct interest in space equipment per se.

These new concepts of commercial finance, generally called secured interest financing (for space equipment and services this would in particular involve "asset-based" and "accounts receivable" financing), have already been adopted by a small number of states. This is expected to change soon with the adoption in 2001 of two multilateral conventions on finance: the UNCITRAL convention on accounts receivable financing is expected to be completed this June in Vienna, and the UNIDROIT convention on mobile equipment finance, and its first protocol developed jointly with ICAO on aircraft finance, are expected to be completed in October. In addition, an OAS-sponsored model national law on secured financing is expected to be approved in November 2001, which may lead to similar developments in other regions.

Issues need to be further considered, such as the relationship of obligations undertaken by states under the UN space law regime and the exercise of rights acquired through the conduct of commercial activities in space under the new draft UNIDROIT convention. The issues where these treaty systems may intersect will need to be analyzed closely, since if sufficient rights cannot be obtained under a space finance treaty, commercial finance and capital markets lending may not take place, and the benefits that could flow to states at all levels of economic development would not be realized.

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The new UNIDROIT convention system and the ICAO/UNIDROIT protocol are expected to attract financing for air transportation by meeting the standards of the capital markets, i.e., the recognition under the proposed new financing treaty system of international financing rights, together with a system for establishing priorities among claimants who hold other financing interests, and a voluntary optional set of “expedited remedies.” Each of these factors is critical to overcome the otherwise high risk associated with space activities, as well as country risk that is often associated with limitations on financing for states at lesser levels of economic development. Reaching a sufficiently high level of commercial certainty as to what rights will be enforced is the primary threshold that must be crossed to extend commercial finance into the space arena.

To achieve such commercial certainty, priority between claimants would be established on the basis of an internationally accessible, computer-based registry system for those rights. Such a registry system would involve a governmental “supervising authority” composed at least of signatory and ratifying states. This type of registry would bear no relationship to, and would not intersect with, registry activities undertaken by OOSA under the UN space law regime. Nevertheless, it may be worthwhile to explore the feasibility and appropriateness of the United Nations, acting through the Committee or OOSA, performing some role in that regard. One possibility is that such a registry authority could be authorized by, and operate as a sub-unit of, the Committee. The registry operation itself would be expected to be con-

tracted to a private high-technology entity, and the cost of operation borne by users.

Another important set of issues to be resolved is the extent to which “associated rights,” which are necessary to operate satellites and provide services, can be enforced. It is, of course, recognized that states may subject the transference of such rights, including orbital positioning and broadcast spectra, to national regulatory regimes. However, the extent to which this would render the ability to exercise rights of telemetry, tracking and control (TTC) uncertain or unachievable would directly affect availability of finance and the cost of that finance under any treaty system. The relationship to state obligations undertaken under the UN space law regime will also have to be examined in this regard.

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Finally, Mr. Chairman, my delegation believes that the Subcommittee has an opportunity here to make a significant contribution to a new financing regime that has the potential to increase space activities and benefit all countries. We believe that the Subcommittee should attach a priority to its work on this item.

### **Cross-References**

*Marine conservation issues in Chapter 13.A.6. and 7.*



## CHAPTER 13

# Environment and Other Transnational Scientific Issues

### A. ENVIRONMENT

#### 1. Stockholm Convention on Persistent Organic Pollutants

On May 23, 2001, the United States signed the Convention on Persistent Organic Pollutants, done at Stockholm, May 22–23, 2001. The Convention was negotiated under the auspices of the United Nations Environment Program with the active participation of the United States. Excerpts from remarks on April 19, 2001 by President Bush, in announcing the United States intention to sign the Convention, and by Secretary of State Colin Powell and Administrator of the Environmental Protection Agency Christine Todd Whitman summarize the major features of the treaty.

The full text of the April 19 Remarks is available at [www.whitehouse.gov/news/releases/2001/04/20010419-2.html](http://www.whitehouse.gov/news/releases/2001/04/20010419-2.html).

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#### PRESIDENT BUSH:

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. . . I'm pleased to announce my support for the [Stockholm Convention on Persistent Organic Pollutants] and the intention of our government to sign and submit it for approval by the United States Senate.

This convention is significant in several respects. First, concerns over the hazards of PCBs, DDT, and the other toxic chemicals covered by the agreement are based on solid scientific

information. These pollutants are linked to developmental defects, cancer, and other grave problems in humans and animals. The risks are great, and the need for action is clear. We must work to eliminate, or at least to severely restrict the release of these toxins without delay.

Second, this agreement addresses a global environmental problem. These chemicals respect no boundaries and can harm Americans even when released abroad. Third, this treaty takes into account understandable concerns of less-developed nations. When these chemicals are used they pose a health and environmental threat, no matter where in the world they're allowed to spread. But some nations with fewer resources have a harder time addressing these threats, and this treaty promises to lend them a hand.

And finally, this treaty shows the possibilities for cooperation among all parties to our environmental debates. Developed nations cooperated with less-developed nations. Businesses cooperated with environmental groups. And now, a Republican administration will continue and complete the work of a Democratic administration.

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SECRETARY POWELL: . . . President Bush's decision to sign the global treaty on persistent organic pollutants demonstrates America's leadership to help make the environment safe for all the world's people. The signing of this treaty on May 23rd in Stockholm and our intention to rapidly bring it into force reflect our government's clear understanding that many environmental problems are global in nature. And it reaffirms our commitment to fostering international cooperation to ensure worldwide environmental safety.

. . . I just want to note that one reason we have taken such strong steps here at home against these chemicals, chemicals which have links to reproductive failure and cancer, is their stable chemical structure. This means that they persist. They persist in the environment, and they accumulate in the food chain.

This is the same quality of stability that makes them such a potent international threat. Through a highly complex process, these pollutants circulate globally, throughout the atmosphere and in the oceans of the world to regions far from their source



of origin. They have been found, for example, in Alaska and the Great Lakes, at great distance from the industrial and agricultural regions where they were released.

That is why the Convention on Persistent Organic Pollutants ["POPs"] is so critical. It commits countries to take significant steps to eliminate or restrict the production of these chemicals, whether they are in the form of pesticides, industrial chemicals, or as unintentional byproducts of industrial or combustion processes.

Let me cover just a few of the major points of the agreement. First, the treaty will ban production and use of pesticides that the President has noted are no longer registered for use in the United States. In recognition of the dire humanitarian need for DDT, for example, to fight malaria in Africa, an exception will be made for this purpose with respect to DDT, in line with international guidelines until a more cost-effective control method is found.

Second, in line with U.S. practice, the treaty will ban production and new use of PCBs. It will mandate national action plans against certain byproducts of combustion, including dioxin, and as in the United States, require use of best available techniques on new sources of POPs byproducts in key categories.

This convention also imposes controls on the handling of POPs waste, as well as on controls on any trade in these chemicals, and it sets up a science-based process to consider whether other chemicals should be added to the convention.

The convention also establishes a flexible framework to provide technical and financial assistance to help countries implement their commitments. The control requirements will cover both developed and developing countries.

Finally, the treaty establishes mechanisms to help developing countries fulfil their obligations. The United States is already a leader in contributing generously to developing country efforts to control POPs. We provided over \$19 million in assistance from 1997 to 2000 for POPs-related projects, and we will continue to provide financial and technical support.

\* \* \* \*

ADMINISTRATOR WHITMAN: . . . [T]his treaty offers a new level of environmental and health protection for the people here in the United States, as well as around the world.

By severely restricting, and in some cases, entirely eliminating the production, use, and/or release of 12 chemicals covered, this treaty will help ensure that American people are protected from the threats that these chemicals present.

\* \* \* \*

Here at home, as you know, the United States has already taken extensive steps and actions over many years to address the pollutants that are covered by this treaty. Registrations of nine of the pesticides covered in this treaty have already been cancelled. We have banned the manufacture of PCBs. And we have imposed stringent controls on the release of other covered chemicals.

\* \* \* \*

Clearly, domestic action alone on these chemicals is not sufficient. In spite of the steps that we have taken, the American public still finds itself at risk. These chemicals not only persist in the environment for years and years and even decades, they also travel far beyond their initial point of release and they gain in their toxicity as they accumulate. And that is something about which we must be very concerned.

Our experience has shown that effective, safe substitutes for these chemicals do exist. That's knowledge that I look forward, and I know we all look forward, to sharing with countries around the world, ways to continue their economic growth and their agricultural growth and protect their health, but using less deadly means.

\* \* \* \*

## **2. Climate Change**

### ***a. U.S. position on Kyoto Protocol***

On November 12, 1998, the United States signed the Kyoto Protocol to the UN Framework Convention on Climate Change, 31 I.L.M. 849 (1992). In 2001 President Bush determined that the United States would not proceed with ratification and implementation of the Protocol. The United States has, however, continued to participate in discussions of the Kyoto Protocol in the context of meetings of the Conference

of Parties to the UN Framework Convention on Climate Change. Excerpts below from the closing statement of Paula J. Dobriansky, Under Secretary of State for Global Affairs, Department of State, to the Seventh Session of the Conference of Parties ("COP-7") in Marrakech, Morocco, November 9, 2001 explain the position of the United States.

The full text of the statement is available at [www.state.gov/g/oes/rls/rm/6050.htm](http://www.state.gov/g/oes/rls/rm/6050.htm).

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During this conference, progress was made in implementing the Framework Convention on Climate Change. Climate change is a serious issue that requires real action. The U.S. delegation appreciated that so many delegates expressed interest in understanding more fully President Bush's climate change initiatives and that they underscored their desire to cooperate on climate science, technological research, market-oriented approaches, and other promising solutions. We, too, seek to deepen international cooperation and we look forward to continuing those discussions.

We are pleased, in addition, that this conference has sent a forward-looking message to the World Summit on Sustainable Development that the international community is united on many matters regarding climate change. Stronger efforts to promote sustainable development could produce substantial climate change benefits.

I wish to highlight a few specific matters about steps taken in Bonn and at this conference. It was recognized at the resumed COP-6, and here at COP-7, that all the Conference's conclusions on funding issues, although technically under the Framework Convention, were adopted in the context of moving forward on the Kyoto Protocol. As a result, there is a complete segregation of funds called for under the Kyoto Protocol from funds used to implement the Framework Convention. It is also recognized that the United States will not be expected to make financial contributions beyond its pre-existing commitments as set forth in the Framework Convention. Associated commitments, such as those calling for reporting on contributions, are obviously also inapplicable.

Regarding adoption of the Kyoto Protocol rules, although the United States does not intend to ratify that agreement, we have

not sought to stop others from moving ahead. Our not blocking consensus on the adoption of the rules for the Kyoto Protocol does not change the United States's view that the Protocol is not sound policy.

Among other things, the emissions targets are not scientifically based or environmentally effective, given the global nature of greenhouse gas emissions and the Protocol's exclusion of developing countries from its emissions limitation requirements, as well as its failure to address black soot and tropospheric ozone. Though we have continued to participate constructively in the Framework Convention process, the decisions reached now—including arbitrary restrictions on both the Kyoto mechanisms and credit for carbon sequestration—reinforce our position that the Kyoto Protocol is just not workable for the United States.

Other countries should be aware that there are many areas in which the Kyoto Protocol and the rules elaborating it contain elements that would not be acceptable to the United States if proposed in another negotiating context in which we participate. Those elements include, for example:

- An institution to assess compliance with emissions targets that is dominated by developing country members without targets;
- More favorable treatment for parties operating within a regional economic integration organization relative to other parties; and
- Rules that purport to change treaty commitments through decisions of the parties rather than through the proper amendment procedure.

Moreover, many of the processes used to arrive at recent decisions under the Framework Convention highlight the need to improve international decisionmaking on the environment. Excessive use of 'take-it or leave-it' ultimatums and Conference decisions that conflict with treaty requirements, for example, can only erode the effectiveness and legitimacy of multilateral environmental treaties. The United States is determined to improve the negotiating process, including in ongoing discussions led by the UN Environment Program.

**b. U.S. review of climate change policy**

At the same time that President Bush announced that the U.S. would not ratify the Kyoto Protocol, he also instituted a Cabinet-level initiative within the U.S. government to review U.S. climate change policy and make recommendations for implementation on both the domestic and international level. On November 29, 2001, Dr. Harlan L. Watson, Senior Climate Negotiator and Special Representative, U.S. Department of State, addressed the Fundacion Gas Natural and Spain's Ministry of Environment International Seminar on "Climate Change: International Agreements and Mitigation Alternatives," in Madrid, Spain. Excerpts below provide a status report on that review.

The full text of Dr. Watson's address is available at [www.state.gov/g/oes/rls/rm/6633.htm](http://www.state.gov/g/oes/rls/rm/6633.htm).

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In March, when President Bush announced that the U.S. would not ratify the Kyoto Protocol, he committed to addressing the climate change issue in a manner that protects our environment, consumers, and economy. He directed his Cabinet to review our climate change policy and to make recommendations for new approaches—both domestic and international—to address this complex issue. He also directed the Cabinet to consider approaches that:

- are science-based,
- encourage research breakthroughs that lead to technological innovation,
- take advantage of the power of markets,
- encourage global participation,
- ensure continued economic growth and prosperity for citizens throughout the world, and
- are consistent with the long-term goal of the Framework Convention of stabilizing greenhouse gas concentrations in the atmosphere.

\* \* \* \*

Although it has been mischaracterized by many, the President's National Energy Policy announced in May contains more than

40 recommendations—out of the 105 total—to promote energy efficiency and conservation and to reduce emissions of greenhouse gases through the use of alternative, renewable, and advanced forms of energy, including biomass, clean coal technologies, geothermal energy, hydropower, nuclear, solar, and wind. The National Energy Policy also encourages the development of long-term alternative energy technologies, such as hydrogen and fusion energy. These recommendations include the following:

#### Efficiency and Conservation Measures

- Promoting the use of combined heat and power through tax incentives and other initiatives.
- Reviewing and providing recommendations on establishing Corporate Average Fuel Economy (CAFe) standards as well as other market-based approaches to increase the national average fuel economy of new motor vehicles.
- Directing all Federal agencies to use technological advances to better protect our environment.
- Promoting energy efficiency, including expanding our Energy Star program, which is a public-private partnership to promote energy efficiency in buildings and consumer products.
- Conserving energy at our Federal facilities, which will cut greenhouse gas emissions in Federal buildings by 30% below 1990 levels by 2010.
- Improving and expanding appliance standards.
- Promoting traffic congestion mitigation technologies.
- Reducing demand for transportation fuels by establishing a ground freight management program.

#### Alternative, Renewable, and Clean Forms of Energy

- Increasing America's use of renewable and alternative energy through expanded research and development programs, expedited geothermal lease processing, and new and enhanced tax incentives—including tax credits for the purchase of new hybrid or fuel-cell vehicles and residential solar energy equipment, for new landfill methane projects, and for electricity produced using wind and biomass.
- Promoting new construction of nuclear capacity that could significantly reduce future greenhouse gas emissions.

- Expanding the use of natural gas.
- Developing a market-based three pollutant strategy to establish a flexible, market-based program to significantly reduce and cap emissions of sulfur dioxide, nitrogen oxides, and mercury from electric power generators that will provide not only significant public health benefits, but also ancillary carbon benefits.
- Increasing research in clean coal technologies—including expenditures of some \$2 billion over 10 years.

Legislation implementing many of these provisions has been approved by the U.S. House of Representatives and is currently being considered by the U.S. Senate, and we hope legislation will be enacted in the very near future.

On June 11, in a speech in the Rose Garden at the White House, President Bush . . . announced, as I mentioned earlier, three initiatives that build upon the nearly \$4 billion that the United States spends annually on climate change-related activities and programs:

Advancing the Science of Climate Change through the U.S. Climate Change Research Initiative (CCRI) to set priorities for additional investments in climate change research and to fully fund priority research areas that are underfunded or need to be accelerated. This is to build upon nearly \$1.7 billion the U.S. Government spends annually on climate change research. This initiative includes up to \$25 million and calls on other developed countries to provide matching funds to help build climate observation systems in developing countries.

Advancing Technology to Address Climate Change through the National Climate Change Technology Initiative (NCCTI) to improve climate change research and development, enhance basic research, strengthen applied research through public-private partnerships, develop improved technologies for measuring and monitoring gross and net greenhouse gas emissions, and support demonstration projects for new cutting-edge technologies.

Promoting Cooperation in the Western Hemisphere and Beyond to build partnerships within the Western Hemisphere and throughout the world and identify areas for enhanced cooperation in climate change activities. In the President's Plan, this cooperation has five components:

- Building on the June 7, 2001 CONCAUSA declaration with seven Central America countries, which calls for “intensified cooperative efforts to address climate change.”
- Strengthening and expanding scientific research within the Western Hemisphere to explore opportunities for collaboration through existing partnerships with research institutes, such as the Inter-American Institute for Global Change Research and others, to better understand regional impacts of climate change.
- Revitalizing U.S. efforts to assist developing countries to acquire the tools and expertise needed to measure and monitor emissions, and to identify and act on emissions of carbon dioxide and other greenhouse gases.
- Promoting the export of climate-friendly, clean energy technologies, building on the President’s National Energy Policy.
- Promoting sustainable forest conservation and land use in the developing world.

On July 13, President Bush described further progress made in the review process, and announced the first set of actions the Cabinet had taken to advance progress of the three initiatives.

First, with respect to the CCRI, he announced that the National Aeronautics and Space Administration (NASA) will invest more than \$120 million over the next three years in four areas [Carbon Cycle, Water and Energy Cycle, Chemistry Climate Connection and Computational Modeling].

\* \* \* \*

In addition, on July 19 the United States and Italy agreed to undertake joint research on climate change in several critical areas, including atmospheric studies related to climate, low carbon technologies, global and regional climate modeling, and carbon cycle research. The Administration has also taken steps to initiate cooperative efforts with Japan, and on October 18 the U.S. National Science Foundation and the European Commission signed an Implementing Arrangement for Cooperative Activities covering scientific cooperation in the field of environmental research, including climate change.

Second, with respect to the NCCTI, the U.S. Department of Energy (DOE) has committed \$25 million to a number of proj-



ects to develop enhanced carbon sequestration technologies, and plans to leverage approximately \$50 million in contributions from the private sector and foreign governments. Two initial projects under this effort include [The Nature Conservancy Project and International Team of Energy Companies].

\* \* \* \*

And third, the initial stages of cooperation in the Western Hemisphere and beyond include:

Debt-for-Nature Swaps with El Salvador, Belize, and Thailand—On July 12, 2001, the U.S. Government signed an agreement with El Salvador to generate over \$14 million in funds to conserve tropical forests, leveraging each dollar in debt relief for nearly two dollars in tropical forest conservation in El Salvador, including protection of El Salvador's cloud forest, which is globally outstanding in terms of its biological diversity. The U.S. Government also completed a debt-for-nature swap with Belize on August 2 that will reduce Belize's debt obligation by some \$1.4 million and that will leverage \$9 million over 26 years into local tropical forest conservation efforts in exchange for Belize's protection of 23,000 acres of vulnerable forestland in the Maya Mountain Maribe Corridor, which includes 16 miles of pristine Caribbean coastline. Finally, the U.S. signed a debt agreement with Thailand on September 19 to reduce Thailand's debt by \$1.2 million and to leverage \$9.5 million over 28 years into local forest conservation activities. Similar efforts with Peru, Panama, Jamaica, and the Philippines have also been approved, pending provision of additional funding by the U.S. Congress.

Climate Change Cooperation Among the U.S., Canada, and Mexico—On June 29, 2001, the Environment Ministers of Canada and Mexico and Governor Whitman, the Administrator of the U.S. Environmental Protection Agency (EPA), pledged "to explore further opportunities for market-based approaches for carbon sequestration, energy efficiency, and renewable energy in North America." The U.S. already has significant climate change collaborative efforts in place with Mexico, through the U.S. Agency for International Development (USAID), the U.S. Departments of Agriculture, Energy, and Interior, and the EPA, and we anticipate that these programs will continue. It is expected that the additional participation of Canada will complement the existing U.S.-Mexico work.

Scientific Cooperation Among the U.S., Mexico and South America—The U.S. Department of Commerce, through its National Oceanic and Atmospheric Administration, and the National Science Foundation are bringing together more than 100 scientists from the U.S., Mexico, and South America to conduct experiments based out of Hualtulco, Mexico for the Eastern Pacific Investigation of Climate Change experiment, the so-called EPIC experiment. This work will produce a better understanding of the interaction of stratus clouds, precipitation, and cool ocean surface temperatures by studying stratus cloud decks located off the west coast of South America. Achieving the EPIC objectives is expected to resolve certain difficulties in the performance of coupled atmosphere-ocean models.

These initial actions are just the beginning of the cooperation that will take place under the three initiatives. As the elements of these initiatives are worked out in more detail, we anticipate there will be additional announcements that further reaffirm that the Bush Administration will continue to play a leadership role in addressing the long-term challenge of climate change both at home and throughout the world.

The Kyoto Protocol is not the only answer to the challenge of global climate change. We believe that our approach must be flexible, and must be based on global participation that takes into account the multifaceted activities that different nations are undertaking. . . .

### **3. Debt-for-Nature Swap**

#### ***Belize***

On August 2, 2001, the United States and Belize signed the first debt-for-nature swap under the 1998 Tropical Forest Conservation Act ("TFCA"), Pub. L. No. 105-214, 112 Stat. 885, 22 U.S.C. § 2431 et seq. Agreement Between the Government of the United States of America and the Government of Belize Regarding a Debt-for-Nature Swap to Prepay and Cancel Certain Debt Owed by the Government of Belize to the Government of the United States of America and its Agencies, entered into force August 22, 2001 ("US-Belize

Agreement"). The TFCA provides opportunities for reduction or cancellation of official debt owed the United States by eligible developing countries in exchange for measures to promote the conservation of tropical forests in those countries. The eligible country's qualifying debt may be restructured under the statute through one of three means: (1) debt reduction; (2) debt buyback; or (3) debt-for-nature swap. In the case of a debt-for-nature swap, a third party buys a debtor country's debt in a lump-sum payment at a discount from the United States, or the United States may receive payment directly from the third party, and reduce or cancel all or part of the debt to facilitate the swap. In turn, the debtor country provides an amount in local currency to be used for eligible tropical forest conservation activities in the debtor country.

Article II of the U.S.-Belize Agreement sets out the basic obligations of the two governments as provided below.

The full text of the Agreement is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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## II. CLOSING

2.1. Obligations of the United States. At the Closing, the United States shall make the U.S. Debt Reduction payment, thereby preparing and canceling all amounts due and unpaid under the Outstanding USAID [U.S. Agency for International Development] Obligations.

2.2. Obligations of [the Government of Belize ("GOB")]. At the Closing, GOB shall (a) make the first payments due in accordance with the terms of the Forest Conservation Agreement, (b) deposit the Escrow Amount in the Escrow Account, and (c) sell, transfer, assign and convey the Crown Block Lands to [the Toledo Institute of Development and Environment, a non-governmental organization in Belize] free and clear of all liens and encumbrances, in accordance with the Forest Conservation Agreement and to be held in trust for the people of Belize.<sup>1</sup>

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<sup>1</sup> The "Escrow Account" is defined in article I as "an interest-bearing account at the U.S. Department of the Treasury" and "Escrow Amount"

On the basis of the U.S.-Belize Agreement, the Government of Belize transferred 11,000 acres of tropical forest land to a consortium of four local non-governmental organizations ("NGOs") to be held in trust for the people of Belize. A separate Forest Conservation Agreement among The Nature Conservancy ("TNC"), the Government of Belize, and the Belize NGOs will fund additional land purchases by NGOs that should increase the protected area to 19,000 acres to be held in trust for the people of Belize. A third agreement, the Swap Fee Contractual Agreement, between the United States and TNC, allows for TNC's contribution of \$800,000 towards relief of debt held by Belize. The results of these agreements are described in a Fact Sheet prepared by the Department of the Treasury below:

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The debt agreement will provide Belize with approximately \$1.4 million in debt stock relief and will allow it to save approximately \$10 million in U.S. dollar payments over the next 26 years. In return, it will issue new obligations in the amount of \$7.2 million, which will generate approximately \$9 million in total local currency payments over a 26 year period. At a total budgetary cost to the United States of approximately \$5.5 million, this deal leverages almost two dollars toward conservation in Belize for every dollar of U.S. funds.

The land to be purchased is approximately 8,000 acres of vulnerable forest land in the Maya Mountain Marine Transectland for conservation. Belize's Maya Mountain Marine Corridor hosts one of the world's richest assemblages of biodiversity; it is home to more than 220 tree species and 50 species of birds. Wildlife that roam the landscape include the jaguar, marguay, scarlet macaw and the endangered West Indian manatee. In addition, as part of this deal, the Government of Belize is setting aside approximately 11,000 acres of Crown Block land for conservation.

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is "U.S. \$71,152, . . . the amount, in the aggregate, that GOB is obligated to pay pursuant to the Forest Conservation Agreement in the first contract year of such agreement." Article I defines "Crown Block Land" as "approximately 11,000 acres of tropical forest land in the Maya Mountain Marine Transect in the Toledo District of Belize. . . ."

#### 4. Participation in Arctic Council

In 2001, the United States continued to pursue important objectives in the Arctic through the Arctic Council, a high level forum established in 1996 by the eight states with sovereignty over territory in that region: Canada, Denmark, Finland, Iceland, Norway, Russia, Sweden and the United States. The Council, in which major groups representing indigenous persons are “permanent participants,” focuses on issues related to sustainable development and environmental protection. It acts primarily through a series of subsidiary bodies in which each of the Arctic States and Permanent participants is represented. In 2000, the United States completed a two-year term as host country for the Council.

Excerpts below from a speech by Ambassador Mary Beth West, Deputy Assistant Secretary for Oceans and Fisheries, Department of State, and head of the US delegation to an Arctic Council meeting in Rovaniemi, Finland on June 11, 2001, addressed key themes of importance to the United States. These include the flexibility of the Council’s operation, derived from particular aspects of the Council’s institutional structure—e.g., that it is a forum and not an international organization. That structure is clarified in the Council’s rules of procedure, which provide that all decision-making in the Council is done by consensus. The United States views the Council as an excellent example of regional cooperation contributing to sustainable development. As a result, the U.S. has stressed the importance of the Council as an achievement to be highlighted at the World Summit on Sustainable Development, planned for August 2002 in Johannesburg.

The full text of Ambassador West’s statement is available at [www.state.gov/g/oes/rls/rm/6971.htm](http://www.state.gov/g/oes/rls/rm/6971.htm).

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... Looking back over the last 10 years, the United States is proud to have been a part of what the Arctic Council and its predecessor, the Arctic Environmental Protection Strategy (AEPS) have accomplished. Publication of the *State of the Arctic Environment*, for example, illustrates the consistently high standards in the

Arctic Council, both for collaborative scientific work and for responsibly raising public awareness of Arctic pollution issues. Looking forward, we see the Council poised to build on the momentum of the first 10 years to achieve even more. For example, we believe two new initiatives—the Arctic Climate Impact Assessment (ACIA) and the International Circumpolar Surveillance (ICS) system for infectious disease—show promise. Both activities enjoy excellent circumpolar cooperation in the scientific community and are responsive to the concerns of Arctic residents. . . .

. . . [T]he Arctic Council is an operational model for international cooperation on sustainable development. In September 2002, the Johannesburg Summit likely will address questions of international governance, and I believe the Arctic Council's regional form of cooperation provides an excellent example to highlight. Certainly, the Council's regional focus is an effective way to deal with the unique problems of the Arctic, and an effective way to make these problems known globally. We only need look at the results of last month's Stockholm Convention on Persistent Organic Pollutants (POPs) to see how effectively the Arctic Council highlighted the POPs situation in the Arctic.

The Council works on the principle of cooperation. Priorities and program initiatives are developed without the operational impediments and costs of establishing a new permanent organization. Members of the Arctic Council are committed to creating the kind of policies, structures and institutions domestically which give us the ability to implement our sustainable development goals regionally. [The Working Group on Protection of Arctic Marine Environment] PAME's work in support of National Plans of Action to address land-based sources of marine pollution is an example of this principle.

The Council is also characterized by flexibility—flexibility to adapt to new problems and priorities. The Council is developing new initiatives to improve human health, transportation infrastructure, freshwater fisheries management, reindeer husbandry, and ecological tourism. These new initiatives are the result of a transparent process of information sharing between all Arctic stakeholders, including governments.

## **5. Governance and Sustainable Development**

At the United Nations Economic Commission for Europe Regional Ministerial Meeting held September 24–25, 2001 in Geneva, the United States provided its views on key issues relevant to the promotion and facilitation of sustainable development. Excerpts from the statement, provided in preparation for the World Summit on Sustainable Development in Johannesburg scheduled for August 2002, are set forth below.

The text of the Statement is available at [www.state.gov/oes/rls/rm/6340.htm](http://www.state.gov/oes/rls/rm/6340.htm).

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The United States Government has given considerable thought to questions related to sustainable development in light of the United Nations Conference on Environment and Development in Rio de Janeiro and the work of the Commission on Sustainable Development. Our goal is for the World Summit in Johannesburg to both take stock of developments since the Rio Conference and provide leadership for domestic efforts and multilateral cooperation in the years to come. To provide that leadership, the Summit in our view should focus on those key issues that are most critical to formulating and implementing policies to promote and facilitate true sustainable development.

In our view, one of those key issues is governance, which is the focus of this paper. By governance we refer to a broad range of issues that support the ability of governments and the public to make sound decisions about and act in the interest of promoting sustainable development.\* Anti-corruption measures and the creation or enhancement of a legal framework of transparent, democratic, non-discriminatory, and accountable institutions are prerequisites for sustainable development.

Domestic good governance is an essential element of sustainable development for all countries, developed and developing, wherever located. It acknowledges the rights of current and future generations to have access to natural resources, and provides a

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\* This paper does not address international environmental governance, which will be the focus of separate discussion at the Summit.

framework for conservation and sustainable management of natural resources, including protection of biological diversity. While the forms of governance will naturally depend on each country's circumstances, there are certain aspects of governance that appear to be applicable universally.

We have identified six areas in particular that deserve special consideration under the heading of governance. All of these factors contribute to economic growth, higher living standards, and social equality. They are as follows:

*Capacity Building.* All states recognize that adequate resources must be available for sustainable development. The largest potential source of capital for capacity building comes from the private and non-governmental sectors, including capital from domestic and foreign private investment. Thus, a government's resolve to create a favorable, enabling climate for investment, through promotion of the key elements of governance, including creating positive incentives, will have a major impact on a country's capacity for sustainable development. Capacity building should continue to be a major focus of the Rio Process.

*Capacity building* involves many disparate but interrelated elements. It focuses on the need to have adequate capability for environmental protection and natural resources conservation, including monitoring, technical assistance, investigation, and enforcement. It includes the need for adequate scientific capability, including appropriate technical research and development. Capacity building involves the availability and diffusion of technology, as well as public awareness, training, and education programs. It also requires the capability to establish the domestic infrastructure needed for promotion of international trade and sound domestic financial management, a major avenue for increasing financial flows.

*Institution Building.* A critical aspect of sustainable development is the building and strengthening of governmental institutions that establish and oversee the manner in which countries meet their social, economic, and environmental goals. Such institutions include a public administration that implements laws, delivers public programs, and makes policy, a judiciary that decides disputes over rights and imposes sanctions for violations of law in accordance with a fair and efficient processes, and a system of laws and policies that ensure the protection of individual rights, including work-



ers rights, social and economic development, and the protection of the environment. These components must be well developed and integrated in order to promote sustainable natural resource use and ensure environmental protection as well as economic and social development. Most importantly, effective, fully functional institutions have a critical impact on the ability of countries to attract and retain private capital investment.

An effective system of laws is a prerequisite for any form of sustainable development. Necessary laws include those that govern individual freedom, real property, intellectual property, government revenue generation and expenditures, access to government program benefits, banking, and corporations—along with laws that protect the environment. Laws that counter corruption are particularly important, as are those that promote an open trading system, both internal and external, all of which are essential to the formation of wealth. Effective governance includes the adoption of measures to promote and protect human rights, fundamental freedoms, and gender equality. Laws are only effective if they are developed in a transparent manner and are implemented fully, fairly, and effectively, and implementation requires the existence of governmental institutions with sufficient resources to accomplish their mandates. Political will and commitment to enforce laws are essential to ensuring sustainable development.

*Public access to environmental and other information in support of sustainable development.* Access to information is an essential element of sustainable development, and promoting that access is something all governments can and must do. Access to environmental information helps educate the public; it prepares citizens to be informed environmental decision makers, provides the raw material for stimulating creative solutions to environmental problems, and provides a foundation for building consensus on critical priorities. Citizens who are well-informed can better understand the environmental impacts of their own activities, the positive impacts of environmental stewardship, the relative severity of environmental risks to themselves and to their communities, the opportunities for preventing pollution and conservation of natural resources, and the uncertainties and complex trade-offs that underlie many environmental decisions.

Governments can provide legal, programmatic, and regulatory frameworks that promote availability of information, includ-

ing laws that require dissemination of information and those requiring release of information to the public upon request. In the context of sustainable development, many types of basic information should be made available, either through the public sector or through the government. Examples include data, inventories, assessments, and technical documents on environmental conditions, including releases of hazardous pollutants, condition of natural resources, census-related data, and information concerning programs and regulatory procedures.

*Informed and science-based decision-making.* It is important that the Rio Process give sufficient attention to the critical role science plays in sustainable development. Science and the scientific method provide the solid foundation needed for societies to undertake sustainable development in all fields. Science-based decisions reflect a careful and objective evaluation of available data and a rigorous integrated review of policy options. Science plays an essential role in informing the best and soundest long-term governmental policies. While this fact has been acknowledged at times in the international discussions concerning the precaution and risk analysis, the Summit needs to underscore the need for science-based decision-making in support of sustainable development.

It is necessary that the economic, social, and environmental impacts of policies and regulations be considered before promulgation of such policies and regulations, and that such considerations be integrated into decision-making generally. This can be assisted through laws that mandate or encourage a science-based peer review of relevant issues prior to undertaking or financing major projects, such as those that may have a significant environmental impact.

*Public Participation, Coordination and Partnerships.* Government can help with sustainable development, but individual citizens are the true engines of change. Meaningful public participation in policy and program development and implementation is a fundamental objective, and this can be promoted by laws and regulations that facilitate interaction among governments, including local governments, and regional organizations, indigenous groups, non-governmental organizations, and other stakeholders. Such laws can include rulemaking processes that provide opportunities for public review and comment before regulations become

effective, and requirements that environmental impact assessment and long-term and strategic planning documents be made available, and subject to, public review and comment.

There needs to be an increased emphasis on non-adversarial methods of achieving basic policy objectives in the context of broader policy and regulatory frameworks. Quite important in that respect are partnerships between government entities and the public, including business and non-governmental organizations. Such partnerships often permit the development of voluntary standards and guidelines that promote innovative solutions to environmental and other concerns. Involving communities in environmental issues also has numerous other advantages. Governments can also play a positive role in providing incentives and support for decision making within the private sector concerning natural resources.

*Access to justice in environmental matters and enforcement of environmental laws and regulations.* The establishment and effective enforcement of laws, regulations, and standards to protect the environment is a necessary component of any effort to achieve sustainable development. Laws and regulations to protect the environment will differ considerably across nations, but effective environmental laws, regulations, and enforcement share certain common attributes. These include clear objectives and standards specified in relevant laws, appropriate regulatory tools and mechanisms to accomplish stated objectives, and consequences for noncompliance. Such consequences can include, *inter alia*, administrative or judicial fines and penalties, injunctive relief, restoration, and financial compensation.

Both the government and concerned individuals must have access to independent judicial and regulatory bodies to enforce environmental laws. Moreover, governments must establish and implement effective enforcement programs, which requires necessary legal authorities, resources and political will. Effective enforcement also requires monitoring and detection programs, as well as a commitment to enforcement that is conducted in a fair and even-handed manner.

Given these many important themes, and their relevance to all countries, we believe that the WSSD will benefit from giving primary attention to domestic governance issues as they relate to the three pillars of sustainable development. Governance can thus provide a good point of departure for discussion of a wide vari-

ety of issues identified in Agenda 21 and developed over the past decade within the Commission on Sustainable Development.

## **6. Dolphin-safe tuna**

Decisions were rendered by two U.S. federal courts during 2001 concerning implementation of the 1997 International Dolphin Conservation Program Act ("IDCPA"), Pub. L. No. 105-42, 111 Stat. 1122 (1997), 16 U.S.C. § 1361, note. The Act is only the most recent effort to protect dolphins from a practice in which fishermen in the Eastern Tropical Pacific Ocean ("ETP") since 1959 have set purse seine nets around groups of dolphins in order to catch the yellowfin tuna that swim below dolphin groups. The killing of millions of dolphins in this process led to the enactment of the Marine Mammal Protection Act in 1972, 16 U.S.C. §§ 1361 et seq. This and subsequent legislation banned importation of tuna that failed to meet certain conditions regarding dolphin mortality, 16 U.S.C. § 1371(a)(2)(B), and prohibited the use of a "dolphin safe" marketing label if the tuna had been caught using purse seine nets intentionally deployed on or to encircle dolphins. 16 U.S.C. § 1385. In 1992, the United States and other nations with purse seine fishing vessels in the ETP negotiated the International Dolphin Conservation Program ("LaJolla Agreement"), formalized in 1997 in the Panama Declaration. The United States undertook in the Panama Declaration to seek changes in U.S. laws pertaining to tuna embargoes, market access, and the dolphin safe label, including a change in the dolphin safe labeling standard to allow tuna caught with purse seine nets to be labeled "dolphin safe" as long as no dolphins were observed to be killed or seriously injured during the "set."

The IDCPA was enacted in part to implement the Panama Declaration. The Act required the Secretary to make Initial and Final Findings as to "whether the intentional deployment on or encirclement of dolphins with purse seine nets is having a significant adverse impact on any depleted dol-

phin stock” and specified certain research to be conducted before March 1, 1999 to provide the basis for the Initial Finding. Section 8 of the IDCPA provided that it would become effective when the Secretary of State certified that a legally-binding instrument establishing the International Dolphin Conservation Program had entered into force. The Agreement on the International Dolphin Conservation Program entered into force on February 5, 1999. 1998 U.S.T. LEXIS 149 (1998).

**a. Change in dolphin-safe label**

On July 23, 2001, the Court of Appeals for the Ninth Circuit in *Brower v. Evans*, 257 F.3d 1058 (9th Cir. 2001), affirmed a district court decision ruling against the Secretary of Commerce regarding the Initial Finding by the Secretary and its effect on the definition of “dolphin-safe” tuna. The case, brought by environmental and animal welfare non-government organizations, challenged the May 7, 1999 Initial Finding under the IDCPA, in which the Secretary had found that “there is insufficient evidence that chase and encirclement by the tuna purse seine fishery ‘is having a significant adverse impact’ on depleted dolphin stocks in the [Eastern Tropical Pacific Ocean].” 64 Fed.Reg. 24590 (May 7, 1999). On this basis, the notice also contained a change in the dolphin safe label standard effective February 2, 2000, to permit the use of “dolphin safe” labeling when purse seine nets were used, as long as no dolphins were killed or seriously injured. *Id.*

The Ninth Circuit found that the IDCPA required the Secretary to make a determination “whether or not” the fishery was having such an impact on dolphins, based on whatever evidence was available, and that by relying on “insufficiency of evidence” he had acted contrary to law and abused his discretion. 257 F.3d at 1071. The IDCPA requires the Secretary of Commerce to make a final finding on this matter by the end of 2002. Until that time the current labeling standard for “dolphin safe tuna” remains in effect.

**b. *Lifting of embargo on Mexican tuna***

In *Defenders of Wildlife v. Hogarth*, 177 F. Supp. 2d 1336 (USCIT 2001), the U.S. Court of International Trade on December 7, 2001 ruled that Department of Commerce regulations implementing the 1999 Agreement on International Dolphin Conservation Program were consistent with the IDCPA and that the U.S. had satisfied related requirements in the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321. The regulations include standards under which the Secretary of Commerce is authorized to lift tuna embargoes. In addition, the regulations include an enforcement regime to ensure that tuna covered under the law is caught in accordance with the international rules on dolphin conservation incorporated in the 1999 Agreement. The court also ruled that the Secretary of Commerce's decision to lift a tuna embargo against Mexico, 65 Fed. Reg. 26585 (May 8, 2000), was lawful. Given the decision in *Brower v. Evans*, discussed above, such tuna will nevertheless be subject to the current labeling standards for "dolphin safe" tuna. That standard is based on the use of certain fishing techniques rather than on whether any dolphin is killed or seriously injured during the course of fishing with purse seine fishing nets.

The excerpt below from the U.S. brief filed in the Court of International Trade on April 27, 2001, provides the views of the United States on application of NEPA to the negotiation of international agreements.

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**3. *The United States Department of State Did Not Have An Obligation To Initiate the NEPA Process With Respect To The Agreement On The IDCP***

\* \* \* \*

Negotiation of the Agreement on the IDCP did not constitute a "major Federal action[] significantly affecting the quality of the human environment" within the meaning of 42 U.S.C. § 4332.

In *Public Citizen v. Office of the United States Trade Representative*, 970 F.2d 916, 919 (D.C. Cir. 1992), the court recognized that section 4332 “specifically identifies the time when an agency’s action is sufficiently concrete to trigger the EIS requirement” and that no such triggering event had occurred with respect to either the North American Free Trade Agreement (“NAFTA”) or Uruguay Round negotiations. “No final agreement has yet been produced in either the NAFTA or Uruguay Round negotiations, and it is unclear whether either round will *ever* produce a final agreement for the President to submit to Congress.” *Id.* (emphasis in original). The same principle applies to the IDCP negotiations. As with all international negotiations, there was never a guarantee that an agreement would be reached. Thus, the IDCP negotiations were not sufficiently concrete so as to require a NEPA analysis.

Stated differently, the negotiation process represented non-final agency action. In *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992), the Court explained that, for purposes of determining whether an agency action is final, “[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of that process is one that will directly affect the parties.” In a subsequent case involving NAFTA and the Uruguay Round, the United States Court of Appeals for the D.C. Circuit relied upon the *Franklin* test in concluding that it did not possess jurisdiction to entertain a challenge to an alleged failure to prepare an EIS because negotiation of these trade agreements did not constitute “final agency action.” *Public Citizen v. Office Of The United States Trade Representative*, 5 F.3d 549, 551 (D.C. Cir. 1993). Similarly, negotiation of the Agreement of the IDCP was not a final agency action.

Conclusion of the Agreement on the IDCP also did not constitute a “major Federal action[] significantly affecting the quality of the human environment.” Indeed, that Agreement had no effects upon the human environment. The statute provides that the lifting of the tuna embargo may occur only when a harvesting nation provides Commerce with documentary evidence that the criteria specified in 16 U.S.C.A. § 1371(a)(2)(B) are met. These actions could only occur upon promulgation of regulations by Commerce.

The Court should decline to rule upon this issue because it involves a nonjusticiable political question. It is established that

a “controversy is nonjusticiable—*i.e.*, involves a political question—where there is ‘a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it. . . .’” *Nixon v. United States*, 506 U.S. 224, 227 (1993) (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)). In *Earth Island, [Inst. v. Christopher*, 6 F. 3d 648, 652-53 (9th Cir. 1993)] the court recognized that “[t]he President alone has the authority to negotiate treaties with foreign countries” and that “[i]nto the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it” (quoting *United States v. Curtiss-Wright Corp.*, 299 U.S. 304, 319 (1936)). As a result, NEPA should not be construed as requiring the preparation of either an EA or an EIS with respect to the Agreement on the IDCP because such a construction would improperly impinge upon the exclusive power of the Executive Branch to negotiate international agreements.

Finally, the Court should decline to entertain this issue due to Defenders’ failure to exhaust their administrative remedies. In *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), the Supreme Court recognized that agencies have the “primary responsibility” for the programs that Congress has charged them to administer and that the exhaustion doctrine promotes this goal. In the administrative proceedings, Defenders argued before Commerce that a NEPA analysis was required before promulgation of the *Interim-Final Rule*. AR XX-849 (Def. App. 18). No such effort was made with respect to the Agreement on the IDCP.

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## **7. Shrimp and endangered sea turtles**

### **a. U.S. compliance with 1998 WTO decision**

On October 22, 2001, the World Trade Organization (“WTO”) Appellate Body released a decision on U.S. shrimp imports and endangered sea turtles, concluding that the United States had taken sufficient steps to address deficiencies found in a 1998 WTO Appellate Body decision. In 1998 the Appellate



Body had found that U.S. legislation banning the importation of shrimp which have been harvested in such a way as to be harmful to endangered sea turtles (Department of Commerce, Justice and State, the Judiciary and Related Agencies Appropriations Act, 1990 (§ 609, Pub. L. No. 101-62) was being implemented in a manner inconsistent with U.S. obligations under the WTO agreement. A statement by the Office of the United States Trade Representative released October 22, 2001 provides the background of this case and U.S. views on the decision. In particular, the United States welcomed confirmation that WTO members may adopt environmental conservation measures if properly implemented.

The statement is available at [www.ustr.gov/releases/2001/10/01-87.htm](http://www.ustr.gov/releases/2001/10/01-87.htm).

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The World Trade Organization (WTO) Appellate Body today released a report finding that the United States' implementation of its sea turtle protection law is fully consistent with WTO rules and complies with earlier recommendations of the Appellate Body. Malaysia, along with three other countries, had brought an initial challenge to the law (known as the "shrimp-turtle" law) in 1996. In the latest phase of the case, Malaysia challenged the United States' compliance with the earlier Appellate Body report. Today's report upholds the conclusions of a WTO panel in June, which found that the United States had complied.

"Today's Appellate Body report confirms that our sea turtle conservation law is consistent with WTO rules, and more generally, shows that the WTO as an institution recognizes the legitimate environmental concerns of its Members," said U.S. Trade Representative Robert B. Zoellick. The preamble to the WTO Agreement recognizes the importance of sustainable development and environmental protection.

The U.S. law restricts imports of shrimp caught in a way that harms endangered sea turtles. In a 1998 report, the Appellate Body agreed with the United States that the law does not violate WTO obligations because it is covered by an exception to WTO rules for measures relating to the conservation of exhaustible natural resources. However, the Appellate Body found that the United

States had unjustifiably discriminated among exporting countries in applying the law. The United States complied with the Appellate Body findings by modifying implementation of its law in a manner that both enhanced sea turtle conservation and addressed the unfair discrimination identified by the Appellate Body.

In the report released today, the Appellate Body agreed with the June 2001 panel report and the United States that the U.S. implementation steps had remedied any unfair discrimination. The Appellate Body took note of the revisions to the shrimp-turtle guidelines that provide more due process to exporting nations. The Appellate Body also recognized the good faith efforts of the United States to negotiate a sea turtle conservation agreement with the Indian Ocean and South-East Asian nations affected by the law.

Background:

Sea turtles are an ancient and far-ranging species, with migratory patterns extending throughout the oceans of the world.

Due to the harvesting of sea turtles and their eggs and to accidental mortality associated with shrimp trawling and other fishing operations, all but one species of sea turtles have become threatened or endangered with extinction throughout all or part of their range.

Researchers have developed special equipment, known as the Turtle Excluder Device, or TED, that virtually eliminates accidental deaths of sea turtles in shrimp trawl nets. For more than a decade, the United States has required that U.S. shrimp fishermen employ TEDs. Over a dozen countries around the globe also require that their shrimp trawlers employ TEDs. Experience has shown that the use of TEDs, combined with other elements of an integrated sea turtle conservation program, can stop the decline in sea turtle populations and will, over time, lead to their recovery.

The U.S. law at issue—Section 609 of Public Law 101-162—restricts imports of shrimp harvested with fishing equipment, such as shrimp trawl nets not equipped with TEDs, that results in incidental sea turtle mortality. It thereby avoids further endangerment of sea turtles.

In October 1996, India, Malaysia, Thailand and Pakistan challenged the U.S. law under WTO dispute settlement procedures, claiming that it was inappropriate for the United States to pre-

scribe their national conservation policies. In April 1998, a panel found that the U.S. measure was inconsistent with Article XI of the General Agreement on Tariffs and Trade (GATT), which provides that WTO Members shall not maintain import restrictions. The United States had maintained that Section 609 fell within the exception under Article XX(g) of the GATT that permits import restrictions relating to the conservation of an exhaustible natural resource. The United States appealed the panel findings to the WTO Appellate Body.

In October 1998, the Appellate Body reversed the findings of the dispute settlement panel. It agreed with the United States that the U.S. law is covered by the GATT exception for measures relating to the conservation of exhaustible natural resources, but found that the United States had implemented the law in a way that resulted in unfair discrimination between exporting nations. The Appellate Body also agreed with the United States that the GATT and all other WTO agreements must be read in light of the preamble to the WTO Agreement, which endorses sustainable development and environmental protection. The Appellate Body confirmed that WTO members may adopt environmental conservation measures such as the U.S. law, so long as they are administered in an even-handed manner and do not amount to disguised protectionism.

In November 1998, the United States announced that it would comply with the Appellate Body report in a manner consistent with its firm commitment to the protection of endangered sea turtles. The United States and the other parties to the dispute reached agreement on a 13-month compliance period, which ended in December 1999.

U.S. compliance steps included revised Department of State guidelines for implementing Section 609, which were issued after providing notice and an opportunity for public comment. The revised guidelines were designed to increase the transparency and predictability of decisionmaking under Section 609 and to afford foreign governments a greater degree of due process.

U.S. compliance steps also included efforts to launch the negotiation of a sea turtle conservation agreement with the governments of the Indian Ocean region on the protection of sea turtles. The United States provided financial assistance to facilitate the

attendance of representatives from developing countries at such negotiations, and considerable progress has been made.

The United States has also offered technical training in the design, construction, installation and operation of TEDs to any government that requests it. Since the adoption of the Appellate Body report, the United States has provided such assistance and training to a number of governments and other organizations in the Indian Ocean and South East Asia region.

Despite the U.S. compliance steps, in October 2000, Malaysia—but none of the other original complainants—requested the re-establishment of the original panel to examine whether the United States had in fact complied with the Appellate Body findings. In June of this year, the panel found that the U.S. implementation of its sea turtle protection law is fully consistent with WTO rules and complies with the earlier recommendations of the WTO Appellate Body. Malaysia then appealed the panel's findings to the WTO Appellate Body.

***b. Litigation in the United States***

In the United States, the U.S. Court of Appeals for the Federal Circuit heard arguments on December 5, 2001, in a case involving review of a key aspect of the State Department's implementation of Section 609 (see 7.a. *supra*). The U.S. Court of International Trade had found that the Department of State's Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations, 63 Fed.Reg. 46,094 (Aug. 28, 1988) and 64 Fed. Reg. 14,481 (Mar. 25, 1999) violated the sea turtle protective statute. *Turtle Island Restoration Network v. Minetta*, 110 F. Supp. 2d 1005 (USCIT 2000). The November 1998 revisions had been issued as part of the U.S. effort to comply with the WTO decision of that year discussed above. They provided for shipment-by-shipment approval of importation of shrimp caught using turtle excluder devices from nations not certified by Congress. The excerpts below from the brief of the United States filed in February 2000, provide the United States views on proper

implementation of the legislation. The appeal was pending at the close of 2001.

The full text of the brief is available at [www.state.gov/s/l](http://www.state.gov/s/l)

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## STATEMENT OF THE FACTS

**A. Pertinent Statutory Provisions.**—Section 609 of the Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act of 1990, Pub. L. No. 101–162, 103 Stat. 988, 1037 (Nov. 21, 1989) (found at 16 U.S.C. 1537 note (1995 Supp.)) has two subsections. Subsection (a) calls upon the Secretary of State to initiate negotiations with foreign nations to develop treaties to protect sea turtles. Subsection (b) requires limitations on the importation of shrimp as follows:

(b)(1) **In general.**—The importation of shrimp or products from shrimp which have been harvested with commercial fishing technology which may affect adversely such species of sea turtles shall be prohibited not later than May 1, 1991, except as provided in paragraph (2).

(2) **Certification procedure.**—The ban on importation of shrimp or products from shrimp pursuant to paragraph (1) shall not apply if the president shall determine and certify to the Congress not later than May 1, 1991, and annually thereafter that—

(A) the government of the harvesting nation has provided documentary evidence of the adoption of a regulatory program governing the incidental taking of such sea turtles in the course of such harvesting that is comparable to that of the United States; and

(B) the average rate of that incidental taking by the vessels of the harvesting nation is comparable to the average rate of incidental taking of sea turtles by United States vessels in the course of such harvesting; or

(C) the particular fishing environment of the harvesting nation does not pose a threat of the incidental taking of such sea turtles in the course of such harvesting.

\* \* \* \*

**C. 1998 Guidelines.**—On August 28, 1998, State issued revised Guidelines implementing Section 609. See Addendum. These 1998 Guidelines reinstituted the importation of TED-caught shrimp from uncertified nations. *Revised Notice of Guidelines for Determining Comparability of Foreign Programs for the Protection of Sea Turtles in Shrimp Trawl Fishing Operations*, 63 Fed. Reg. 46094, 46095 (1998) (“the harvesting of shrimp with TEDs does not adversely affect sea turtle species and \* \* \* TED-caught shrimp is \* \* \* not subject to the import prohibition created by Section 609(b)(1).”). As in the 1996 Guidelines, the 1998 Guidelines identified four categories of shrimp and shrimp products not subject to the embargo: (1) aquaculture shrimp; (2) TED-caught shrimp; (3) artisanal shrimp; and (4) cold water shrimp. The 1998 Guidelines also provided similar mechanisms for determining comparability and providing the basis for certification of nations. *Id.* at 46096. State deemed the 1998 Guidelines to represent the best balance among competing interests: consistency with the statutory language, consistency with the “Department’s policy of using trade restrictions precisely, not in an overbroad manner,” and consistency with the policy of encouraging individual shrimp harvesters to use TEDs:

Once such harvesters become familiar with the advantages of using TEDs, [FN 2] we believe that skepticism in foreign nations about TEDs technology will lessen and the number of country-wide TEDs programs may increase.

[FN2] In addition to allowing sea turtles to escape from shrimp trawl nets, TEDs also direct other large, unwanted debris out of such nets, thus increasing the efficiency of the trawling operation and reducing fuel costs.

In addition to allowing the importation of TED-caught shrimp from uncertified nations, the 1998 Guidelines addressed concerns raised by interested parties (including plaintiffs) and other gov-

ernmental agencies about the Guidelines' effect on the conservation of sea turtle species, and established additional conditions and incentives to implement State's determination that TED-caught shrimp is not subject to the import prohibition.

\* \* \* \*

## ARGUMENT

\* \* \* \*

. . . [T]he first inquiry under Section 609(b)(1) is whether the shrimp to be imported was harvested with "commercial fishing technology which may affect adversely" listed species of sea turtles. Unless this question is answered in the affirmative, the prohibition simply does not apply. Consequently, if it can be demonstrated to the satisfaction of the U.S. that shrimp has been harvested with technology that does *not* adversely affect sea turtles, *e.g.*, hand nets or nets equipped with TEDs, then there is no need to proceed further in the statute to determine whether the country from which the shrimp is imported has been certified. Section 609 consequently does not compel State to establish country-wide embargoes against shrimp from uncertified countries.

Since the statute does not define the potentially harmful technologies covered by the embargo, the Guidelines make the appropriate identification. The 1998 Guidelines identified four types of shrimp products not subject to embargo: aquaculture, TED-caught, artisanal and cold-water shrimp. This determination—that shrimp harvested under certain conditions that do not adversely affect sea turtles is not subject to embargo—is thus squarely rooted in the language of Section 609.

\* \* \* \*

### **D. The State Department's Interpretation, Unlike the CIT's, Minimizes Potential Conflict with International Law.**

The CIT-imposed import prohibition on TED-caught shrimp from uncertified nations contributed to the WTO Appellate Body's finding the United States' implementation of Section 609 violated obligations under GATT. In particular, the WTO Appellate Body found that there appears to be no adequate justification for the

United States to embargo shrimp caught with turtle-safe technology equivalent in effectiveness to that required and used in this country. Reimposition of the embargo on TED-caught shrimp from uncertified countries could be used by the complaining country in the WTO proceeding to argue that the United States is not applying Section 609 in compliance with U.S. international obligations. The CIT's interpretation could again contribute to a finding that the United States was in violation of its international obligations; by contrast, State's interpretation, which minimizes that potential, best implements Section 609.

It is an elementary principle of statutory construction that "an act of Congress ought never to be construed to violate the law of nations, if any other possible construction remains \* \* \*." *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804); accord, *Federal Mogul Corp. v. United States*, 63 F.3d 1572, 1581-82 (Fed. Cir. 1995). While international obligations cannot override inconsistent requirements of domestic law, "ambiguous statutory provisions \* \* \* [should] be construed, where possible, to be consistent with international obligations of the United States." *Footwear Distributors and Retailers of America v. United States*, 852 F. Supp. 1078, 1088 (CIT), appeal dismissed, 43 F.3d 1486 (Fed. Cir. 1994), citing *DeBartolo Corp. v. Florida Gulf Coast Building and Trades Council*, 485 U.S. 568 (1988). These longstanding principles of statutory construction support the government's interpretation of the scope of Section 609(b)(1).

Furthermore, where legislation affects international relations, this Court is especially deferential to the Executive Branch's interpretation of its statutory obligations. As the Court recently held, "in cases in which international relations are concerned, the President plays a dominant role. In these matters, it is generally assumed that Congress does not set out to tie the President's hands; if it wishes to, it must say so in clear language." *Humane Society v. Clinton*, \_\_ F.3d \_\_, 2001 WL 8790 at \*10 (Fed. Cir. Jan. 4, 2001); see also *United States v. Curtiss-Wright Exp. Corp.* 299 U.S. 304, 320 (1936). Accordingly, the CIT should have deferred to the government's interpretation of the scope of Section 609(b)(1) which fulfills its charge to construe domestic statutes, to the extent possible, so as not to create inconsistencies with U.S. international obligations.



\* \* \* \*

**c. *Indian Ocean sea turtle conservation agreement***

As noted in the USTR Statement in 4.a. above, the United States had undertaken to negotiate a sea turtle conservation agreement with the governments of the Indian Ocean region as part of a comprehensive regime for the conservation of the region's sea turtle populations and their habitats. In 2001, twenty-one countries, including the United States, attended a Conference on the Conservation and Management of Marine Turtles of the Indian Ocean and South-East Asia in Manila, June 20–23. Representatives from the World Conservation Union, the UN Environment Program, the Smithsonian Conservation Research Center, Wollonagong University, the CMS Secretariat and World Wildlife Fund for Nature also participated. At its conclusion, the Conference adopted a Conservation Management Plan (CMP), annexed to the Memorandum of Understanding on the Conservation and Management of Marine Turtles of the Indian Ocean and Southeast Asia. The CMP is a non-binding agreement adopted under the auspices of the Convention on Migratory Species (CMS) in Kuantan, Malaysia in July 2000. The United States and seven other States signed the MOU on June 23, which became effective on September 1, 2001.

Excerpts below from the United States closing statement indicate both its hopes for the implementation of the MOU and its remaining concerns.

The full text of the MOU and CMP are available at [www.wcmc.org.uk/cms](http://www.wcmc.org.uk/cms).

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The MoU provides for the establishment of an Advisory Committee to provide “scientific, technical and legal advice to the signatory States individually or collectively. . .” in the implementation of the MoU. In the U.S. view, which is shared by most of the other delegations, the Advisory Committee will play a key role in the implementation of the MoU. Pursuant to the MoU, the Committee

are to be determined at the first meeting of the signatory States. To advance discussion on these issues, the U.S. delegation tabled a proposal for the terms of reference (TOR) for the Advisory Committee at the Manila meeting. Following discussion of the U.S. proposal in plenary, in which several delegations provided useful suggestions, the U.S. tabled a revised draft TOR. It is our hope that delegations will consider this revised draft so that the TOR can be adopted at the first meeting of the signatory States and the members of the Committee can be appointed. To this end, the Manila meeting also agreed that signatory States could nominate individuals for appointment to the Advisory Committee in advance of the first meeting of signatory States.

### **New Hope for Sea Turtles**

Though non-binding, the MoU and CMP contain 24 strong, forward-looking programs and 105 corresponding activities, categorized under six objectives. If these programs and activities are effectively implemented, this CMP will go a long way towards helping to conserve endangered sea turtle populations and their habitats in this region. Many sea turtle populations in this region have seen precipitous declines in the past few decades. However, funding, technical assistance and in-kind support will be essential to realizing the objectives of the CMP. Australia and UNEP committee funds and other types of support for the next three years.

At the end of the meeting, the U.S. delegation read a closing statement, indicating our intention to continue to provide technical assistance in support of this important initiative. The U.S. statement nevertheless expressed dissatisfaction with the non-binding status of the MoU and called once again for reconsideration of this issue in the near term. The statement also noted that the MoU itself will do nothing to help sea turtles unless it prompts states, organizations and individuals in the region to implement effective measures in the marine areas and nesting beaches on which sea turtles occur.

## **B. MEDICAL AND HEALTH ISSUES**

### **HIV/AIDS**

#### **a. *UN General Assembly Special Session on HIV/AIDS***

On June 27, 2001, the United States issued a Joint Statement by the Department of State and the Department of Health and Human Services at the conclusion of the UN General Assembly Special Session on HIV/AIDS, provided in full below.

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The U.S. is pleased with the outcome of the UN General Assembly Special Session on HIV/AIDS, which concluded today. The entire world came together this week to speak with one voice to respond to the challenge of HIV/AIDS. As Secretary of State Colin L. Powell told the General Assembly on Monday, "No war on the face of the earth is more destructive than the AIDS pandemic." A concerted effort by all the nations of the world is needed to address this great catastrophe. "We must remain on the offensive in the war against HIV and AIDS, we must take the necessary precautions to prevent the contraction and spread of HIV, and we must reach out and warn those most vulnerable," said Health and Human Services Secretary Tommy G. Thompson.

We agree with the session's final document, "The Declaration of Commitment on HIV/AIDS," which stated clearly that "prevention (of new HIV/AIDS infections) must be the mainstay of our response." This document charts a clear course of action for all nations to fight against HIV/AIDS at all levels, with a strong emphasis on effective partnership between governments and civil society, including faith-based organizations.

We welcome Secretary General Kofi Annan's statement to the press today that everyone now recognizes the need for additional resources to fight the HIV/AIDS pandemic, and we appreciate his personal engagement in the effort to raise money for this fight. The U.S. government looks forward to working with the Secretary General, with our G-8 partners and other potential donors, and with the private sector and civil society to launch a global fund to fight HIV/AIDS, tuberculosis, and malaria.

**b. *WTO Ministerial in Doha***

At the WTO Ministerial in Doha on November 14, 2001, discussed in Chapter 11, the United States endorsed the Ministerial Declaration, including Paragraph 17, which provides:

We stress the importance we attach to implementation and interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) in a manner supportive of public health, by promoting both access to existing medicines and research and development into new medicines and, in this connection, are adopting a separate declaration.

**c. *U.S. Executive Order***

This view was further supported by the separate declaration on TRIPS and public health, which the United States also supported.

The United States had already taken action consistent with these views. In May 2000 the President issued Executive Order 13155, Access to HIV/AIDS Pharmaceuticals and Medical Technologies. 65 Fed. Reg. 30,521 (May 12, 2000). The Executive Order provides as follows:

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By the authority vested in me as President by the Constitution and the laws of the United States of America, including sections 141 and chapter 1 of title III of the Trade Act of 1974, as amended (19 U.S.C. 2171, 2411–2420), section 307 of the Public Health Service Act (42 U.S.C. 2421), and section 104 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2151b), and in accordance with executive branch policy on health-related intellectual property matters to promote access to essential medicines, it is hereby ordered as follows:

Section 1. Policy. (a) In administering sections 301–310 of the Trade Act of 1974, the United States shall not seek, through negotiation or otherwise, the revocation or revision of any intellectual

property law or policy of a beneficiary sub-Saharan African country, as determined by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies if the law or policy of the country:

(1) promotes access to HIV/AIDS pharmaceuticals or medical technologies for affected populations in that country; and

(2) provides adequate and effective intellectual property protection consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)).

(b) The United States shall encourage all beneficiary sub-Saharan African countries to implement policies designed to address the underlying causes of the HIV/AIDS crisis by, among other things, making efforts to encourage practices that will prevent further transmission and infection and to stimulate development of the infrastructure necessary to deliver adequate health services, and by encouraging policies that provide an incentive for public and private research on, and development of, vaccines and other medical innovations that will combat the HIV/AIDS epidemic in Africa.

Sec. 2. Rationale: (a) This order finds that:

(1) since the onset of the worldwide HIV/AIDS epidemic, approximately 34 million people living in sub-Saharan Africa have been infected with the disease;

(2) of those infected, approximately 11.5 million have died;

(3) the deaths represent 83 percent of the total HIV/AIDS-related deaths worldwide; and

(4) access to effective therapeutics for HIV/AIDS is determined by issues of price, health system infrastructure for delivery, and sustainable financing.

(b) In light of these findings, this order recognizes that:

(1) it is in the interest of the United States to take all reasonable steps to prevent further spread of infectious disease, particularly HIV/AIDS;

(2) there is critical need for effective incentives to develop new pharmaceuticals, vaccines, and therapies to combat the HIV/AIDS crisis, including effective global intellectual prop-

erty standards designed to foster pharmaceutical and medical innovation;

(3) the overriding priority for responding to the crisis of HIV/AIDS in sub-Saharan Africa should be to improve public education and to encourage practices that will prevent further transmission and infection, and to stimulate development of the infrastructure necessary to deliver adequate health care services;

(4) the United States should work with individual countries in sub-Saharan Africa to assist them in development of effective public education campaigns aimed at the prevention of HIV/AIDS transmission and infection, and to improve their health care infrastructure to promote improved access to quality health care for their citizens in general, and particularly with respect to the HIV/AIDS epidemic;

(5) an effective United States response to the crisis in sub-Saharan Africa must focus in the short term on preventive programs designed to reduce the frequency of new infections and remove the stigma of the disease, and should place a priority on basic health services that can be used to treat opportunistic infections, sexually transmitted infections, and complications associated with HIV/AIDS so as to prolong the duration and improve the quality of life of those with the disease;

(6) an effective United States response to the crisis must also focus on the development of HIV/AIDS vaccines to prevent the spread of the disease;

(7) the innovative capacity of the United States in the commercial and public pharmaceutical research sectors is unmatched in the world, and the participation of both these sectors will be a critical element in any successful program to respond to the HIV/AIDS crisis in sub-Saharan Africa;

(8) the TRIPS Agreement recognizes the importance of promoting effective and adequate protection of intellectual property rights and the right of countries to adopt measures necessary to protect public health;

(9) individual countries should have the ability to take measures to address the HIV/AIDS epidemic, provided that such measures are consistent with their international obligations; and

(10) successful initiatives will require effective partnerships and cooperation among governments, international organizations, nongovernmental organizations, and the private sector, and greater

consideration should be given to financial, legal, and other incentives that will promote improved prevention and treatment actions.

Sec. 3. Scope. (a) This order prohibits the United States Government from taking action pursuant to section 301(b) of the Trade Act of 1974 with respect to any law or policy in beneficiary sub-Saharan African countries that promotes access to HIV/AIDS pharmaceuticals or medical technologies and that provides adequate and effective intellectual property protection consistent with the TRIPS Agreement. However, this order does not prohibit United States Government officials from evaluating, determining, or expressing concern about whether such a law or policy promotes access to HIV/AIDS pharmaceuticals or medical technologies or provides adequate and effective intellectual property protection consistent with the TRIPS Agreement. In addition, this order does not prohibit United States Government officials from consulting with or otherwise discussing with sub-Saharan African governments whether such law or policy meets the conditions set forth in section 1(a) of this order. Moreover, this order does not prohibit the United States Government from invoking the dispute settlement procedures of the World Trade Organization to examine whether any such law or policy is consistent with the Uruguay Round Agreements, referred to in section 101(d) of the Uruguay Round Agreements Act.

(b) This order is intended only to improve the internal management of the executive branch and is not intended to, and does not create, any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies or instrumentalities, its officers or employees, or any other person.

### **Cross-References**

*Resolution on Access to Medication*, Chapter 6.E.2.  
*Environment and Trade*, Chapter 11.E.2.





## CHAPTER 14

### Educational and Cultural Issues

#### INTERNATIONAL CULTURAL PROPERTY PROTECTION

During 2001, the United States took action to protect cultural property in Italy and Bolivia at the request of those countries pursuant to the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972), ratified by the United States in 1983 (“1970 UNESCO Convention”), as implemented for the United States by the Convention on Cultural Property Implementation Act, Pub.L. 97-446, 19 U.S.C. § 2601 *et seq.*). These authorities enable the United States to impose import restrictions on certain archaeological or ethnological material when pillage of these materials places the cultural heritage of another State Party to the Convention in jeopardy. Since the United States implemented the 1970 UNESCO Convention in 1983, it has imposed import restrictions on archaeological or ethnological materials from ten countries to assist in the protection of their cultural property.

#### 1. Italy

On January 19, 2001, the United States entered into a Memorandum of Understanding with the Government of the Republic of Italy (“MOU”) to protect pre-classical, classical and imperial Roman archaeological material. Under Article I of the MOU, the United States agrees to restrict

importation into the United States of certain archeological material unless Italy issues a license or other documentation certifying that exportation was not in violation of its law and to offer for return to Italy any material forfeited to the United States under this restriction. Article II sets forth measures to be taken by each government in order for the U.S. import restrictions to be fully successful in deterring pillage and to further protect Italy's cultural patrimony. The countries also agree to use their best efforts to encourage further interchange of archaeological materials for cultural, exhibition, educational and scientific purposes to enable widespread public appreciation of and legal access to Italy's rich cultural heritage. The MOU is to remain in force for five years and may be extended. The import restrictions agreed to in the MOU are effective upon publication by the U.S. Customs Service in the Federal Register on January 23, 2001. 66 Fed.Reg. 7399 (Jan. 23, 2001). The excerpts below from that Notice explain the action being taken.

Further information, including a complete copy of the U.S.-Italy MOU and the Federal Register Notice, is available at <http://exchanges.state.gov/education/culprop/list.html>.

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The value of cultural property, whether archaeological or ethnological in nature, is immeasurable. Such items often constitute the very essence of a society and convey important information concerning a people's origin, history, and traditional setting. The importance and popularity of such items regrettably makes them targets of theft, encourages clandestine looting of archaeological sites, and results in their illegal export and import.

The U.S. shares in the international concern for the need to protect endangered cultural property. The appearance in the U.S. of stolen or illegally exported artifacts from other countries where there has been pillage has, on occasion, strained our foreign and cultural relations. This situation, combined with the concerns of museum, archaeological, and scholarly communities, was recognized by the President and Congress. It became apparent that it was in the national interest for the U.S. to join with other coun-

tries to control illegal trafficking of such articles in international commerce.

The U.S. joined international efforts and actively participated in deliberations resulting in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)). U.S. acceptance of the 1970 UNESCO Convention was codified into U.S. law as the "Convention on Cultural Property Implementation Act" (Pub.L. 97-446, 19 U.S.C. 2601 et seq.) ("the Act"). This was done to promote U.S. leadership in achieving greater international cooperation towards preserving cultural treasures that are of importance to the nations from where they originate and to achieving greater international understanding of mankind's common heritage.

During the past several years, import restrictions have been imposed on archaeological and ethnological artifacts of a number of signatory nations. These restrictions have been imposed as a result of requests for protection received from those nations as well as pursuant to bilateral agreements between the United States and other countries. More information on import restrictions can be found on the International Cultural Property Protection web site (<http://exchanges.state.gov/education/culprop>).

Import restrictions are now being imposed on certain archaeological material of Italy representing the pre-Classical, Classical, and Imperial Roman periods of its cultural heritage as the result of a bilateral agreement entered into between the United States and Italy. This agreement was entered into on January 19, 2001, pursuant to the provisions of 19 U.S.C. 2602. Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the agreement between the United States and Italy. This document amends the regulations by imposing import restrictions on certain archaeological material from Italy as described below.

### **Material Encompassed in Import Restrictions**

In reaching the decision to recommend protection for Italy's cultural patrimony, the Assistant Secretary of State for Educational and Cultural Affairs, U.S. Department of State, determined that,

pursuant to the requirements of the Act, the cultural patrimony of Italy is in jeopardy from the pillage of archaeological materials which represent its pre-Classical, Classical and Imperial Roman heritage, and that such pillage is widespread, definitive, systematic, on-going, and frequently associated with criminal activity. Dating from approximately the 9th century B.C. to approximately the 4th century A.D., categories of restricted artifacts include stone sculpture, metal sculpture, metal vessels, metal ornaments, weapons/armor, inscribed/decorated sheet metal, ceramic sculpture and vessels, glass architectural elements and sculpture, and wall paintings. These materials are of cultural significance because they derive from cultures that developed autonomously in the region of present day Italy that attained a high degree of political, technological, economic, and artistic achievement. The pillage of these materials from their context has prevented the fullest possible understanding of Italian cultural history by systematically destroying the archaeological record. Furthermore, the cultural patrimony represented by these materials is a source of identity and esteem for the modern Italian nation.

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## 2. Bolivia

On December 4, 2001, the United States entered into a similar Memorandum of Understanding with Bolivia to protect Pre-Columbian archaeological materials and Colonial and Republican ethnological materials from Bolivia. Import restrictions on these materials were effective with publication by the U.S. Customs Service in the Federal Register on December 7, 2001. 66 Fed. Reg. 63,490 (Dec. 7, 2001). Excerpts below from the notice describe the coverage of the Bolivia MOU.

The full text of the MOU and the notice is available at <http://exchanges.state.gov/education/culprop/list.html>.

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Import restrictions are now being imposed on certain archaeological and ethnological materials originating in Bolivia as the result of a bilateral agreement entered into between the United States and Bolivia (the Agreement). The Agreement was entered into on December 4, 2001, pursuant to the provisions of 19 U.S.C. 2602. The archaeological materials subject to the Agreement represent pre-Columbian cultures of Bolivia and range in date from approximately 10,000 B.C. to A.D. 1532. The ethnological materials subject to the Agreement are from the Colonial and Republican periods and range in date from A.D. 1533 to 1900.

Accordingly, § 12.104g(a) of the Customs Regulations is being amended to indicate that restrictions have been imposed pursuant to the Agreement between the United States and Bolivia. This document amends the regulations by imposing import restrictions on certain archaeological and ethnological materials from Bolivia as described below.

It is noted that emergency import restrictions on antique ceremonial textiles from Coroma, Bolivia were previously imposed but are no longer in effect. (See T.D. 89-37, published in the Federal Register (54 FR 17529) on March 14, 1989, and T.D. 93-34 published in the Federal Register (58 FR 29348) on May 20, 1993.) The restrictions published in this document are separate and independent from these previously imposed emergency import restrictions. This document removes the reference in the Customs Regulations in § 12.104g(b) to these expired emergency import restrictions.

### **Material Encompassed in Import Restrictions**

In reaching the decision to recommend protection for the cultural patrimony of Bolivia, the Acting Assistant Secretary for Educational and Cultural Affairs of the U. S. State Department determined, pursuant to the requirements of the Act, that the cultural patrimony of Bolivia is in jeopardy from the pillage of archaeological and ethnological materials and this pillage is widespread, on-going, and systematically destroying the non-renewable archaeological and ethnological record of Bolivia.

The archaeological materials which are the subject of the Acting Assistant Secretary's determination represent pre-Columbian cultures of Bolivia, range in date from approximately 10,000

B.C. to A.D. 1532, and include: (1) objects comprised of textiles, featherwork, ceramics, metals, and lithics (stone); and (2) perishable remains, such as bone, human remains, wood, and basketry that represent cultures including but not limited to the Formative Cultures (such as Wankarani and Chiripa, Tiwanaku, and Inca), Tropical Lowland Cultures, and Aymara Kingdom. The ethnological materials which are the subject of the Acting Assistant Secretary's determination represent the Colonial and Republican periods, range in date from A.D. 1533 to 1900, and include: (1) objects of indigenous manufacture and ritual, sumptuary, or funeral use related to the pre-Columbian past, which may include masks, wood, musical instruments, textiles, featherwork, and ceramics; and (2) objects used for rituals and religious ceremonies, including Colonial religious art, such as paintings and sculpture, reliquaries, altars, altar objects, and liturgical vestments.

The Acting Assistant Secretary also determined, pursuant to the requirements of the Act, that the archaeological materials covered by the Agreement are of cultural significance because they derive from numerous cultures that developed autonomously in the Andean region and attained a high degree of technological, agricultural, and artistic achievement, but whose underlying political, economic, and religious systems remain poorly understood. Also, the archaeological materials represent a legacy that serves as a source of identity and pride for the modern Bolivian nation. The Acting Assistant Secretary determined that the ethnological materials play an essential and irreplaceable role in indigenous Bolivian communities and are vested with symbolic and historic meaning. They are used in ceremonial and ritualistic practices and frequently serve as marks of identity within the society. Serving as testimony to the continuation of pre-Columbian cultural elements despite European political domination, they form an emblem of national pride in a society that is largely indigenous.

Also, pursuant to the requirements of the Act, the Acting Assistant Secretary determined that Bolivia has taken measures consistent with the Convention to protect its cultural patrimony, and that the application of import restrictions set forth in Section 307 of the Act is consistent with the general interest of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes.

## CHAPTER 15

# Private International Law

### MULTILATERAL DEVELOPMENTS

#### 1. Overview

In August 2001, Harold S. Burman, attorney-adviser, Office of Private International Law, Office of the Legal Adviser, Department of State, delivered a speech to a convention of the American Bar Association in Chicago, Illinois, entitled “International Harmonization of Private Law: 2001.” The speech, provided below, provides an overview of current developments in the area of private international law of interest to the United States.

The two international organizations referred to in the speech that are dedicated to addressing issues of private international law are the United Nations Commission on International Trade Law (“UNCITRAL”) and the International Institute for the Unification of Private Law (“UNIDROIT”). UNCITRAL is the principal organ of the United Nations for the harmonization and development of international trade rules. UNCITRAL is headquartered in Vienna, with 36 member countries and active participation from a larger group of public and private sector observers. UNCITRAL works in areas including commercial law, arbitration and dispute resolution, banking, public procurement, bankruptcy, and electronic commerce; it does not address tariff and non-tariff barriers to trade. UNIDROIT is an intergovernmental body of approximately 60 member states, established originally in 1926 by the League of Nations, and headquartered in

Rome. The United States is an active participant in its work program, which concentrates on international commercial and trade law matters.

The Hague Conference, based in The Hague, is the oldest of the organizations devoted to the harmonization and development of private international law. It has traditionally focused on conflict of laws, judicial cooperation and family law. The Organization of American States is also active in regional work in private international law.

The text of the speech is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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### **Current international private law (PIL) developments through mid-2001**

Private international law (“PIL”) projects, including unification or harmonization of commercial law, necessarily build on comparative law and practice but seek to go beyond that to reach international standards through negotiations. The general purpose, unlike that of the public law, is to adopt legal standards that can be used by private parties in cross-border commerce to structure transactions, assess legal risk, and enforce rights or obligations directly in national courts or through arbitration. International PIL negotiations also serve to clarify both black-letter and transactional differences between legal systems, point up the extent to which economic developments and business practices can be reflected through this process, and clarify issues relevant to business credit and country risks in the various negotiating countries.

Public law negotiations on related trade matters, by way of contrast, generally focus on market access issues, rather than on rules usable for particular transactions, avoid comparative law issues to the extent possible, and provide for rights enforceable generally through some form of governmental process, whether national or international (such as the WTO, NAFTA, ICSID, etc.). Public trade law for example might focus on opening market access for certain banking and financial services, as is done under NAFTA and authorize cross-border activities, without dealing with contract or other terms and conditions of cross-border banking practices, and usu-



ally without requiring parity or commonality between applicable legal systems. Related private law projects, by contrast, in the banking and financial services area in recent years have covered harmonization of bank guarantee and letter of credit law by treaty, international credit transfers, uniform treaty standards for modern negotiable instruments, and more recently efforts to upgrade international private law for secured financing.

Set out below are a selection of current developments on commercial law projects sponsored by international governmental bodies. While many depend on participation by and important preparatory work of private sector groups, implementation often, but not always, requires some measure of governmental sanction to create commercial predictability for cross-border transactions. As a preliminary comment, the first two categories below were, as recently as the mid-1990's, at the top of the "impossible" list, that is areas of law so divided by country differences and established traditions as to render efforts at harmonization out of the question. . . .

### *International Commercial Finance*

This topic leads the list because 2001 will be an unusual year in this field. Traditional wisdom assured us as recently as the mid-1990's that secured finance law reform was wholly impractical, given the wide divergences between country laws and even the purposes such laws served. Yet, now by the end of this year three international projects on secured financing are likely to be completed, which will set the stage for possible implementation by the U.S. and other countries either by treaty enactment, legislation or promotion by trade and other associations. A fourth project has begun, and two more are on the immediate horizon. All share some commonality from the U.S. vantage point, i.e. if properly completed they will reflect and promote modern commercial finance and capital markets standards. This means avoiding the more traditional method of harmonization, i.e. the balancing of existing legal systems, and using instead financial benefits and efficiency of the commercial law as benchmarks. The extent to which this can be accomplished will be a reflection of the extent to which globalization continues to strongly affect world attitudes in the coming year.

**UNCITRAL: Convention on accounts receivable financing**

This potentially far-reaching convention is based on economic principles, already reflected in the UCC and the laws of some countries, and not simply harmonization of existing laws on assignments. The convention will cover international assignments as well as domestic assignments of cross border receivables, and will permit assignments of non-possessory and future interests, as well as “bulk” assignments, all of which are cornerstones of modern commercial finance. Perfection and priority, on which consensus on a single rule could not be reached, is determined by applicable law pointers which permit transaction structuring, by resting on the location of the assignor for most purposes, and the location of the debtor for certain provisions which affect the debtor’s rights. The connection with insolvency law is also dealt with by applicable law pointers. Additional provisions override most anti-assignment clauses, provide a limited proceeds rule, and set out optional standards for conflict of laws rules. Optional provisions for priority rules keyed to a notice filing registry system, and a treaty basis for a future computer-based international registry are set out in an annex, along with alternative priority rule systems currently employed by some countries.

The final text was completed at the 2001 UNCITRAL plenary session in June/July in Vienna, with approval by the UN General Assembly expected in December 2001.

**UNIDROIT: Draft convention on mobile equipment finance**

Parallel in many respects to the UNCITRAL convention, the UNIDROIT convention focuses on asset-based finance, also reflected in the UCC (Articles 2A and revised 9). The draft convention provides for the creation of an international interest which would prevail over otherwise valid local interests to the extent covered by the convention. Each type of equipment will need a separate negotiated protocol. The first protocol on aircraft equipment is expected to be completed along with the basic convention. Additional draft protocols are already in preparation for rail and space equipment, and other equipment categories may follow.

Unlike the UNCITRAL convention, it provides at the outset for establishment of an international notice-filing registry for perfection and priority, and includes provisions on remedies and undertakings as to timeliness, as well as optional provisions on remedies and insolvency rules which, if selected by ratifying states, would enhance credit capacity for covered transactions.

The convention and the ICAO-UNIDROIT protocol on aircraft is expected to be completed in November 2001 at a diplomatic conference in South Africa. Efforts are already underway to develop an international registry prototype, which potentially can set a precedent for industry association-based treaty implementation, and when implemented can set the stage for comparable international computer-based registries for other treaties.

### **OAS: Model Inter-American Law on Secured Financing and Cross-border Loan Agreements**

At the Sixth OAS Specialized Conference on Private International Law (CIDIP-VI), scheduled for November 2001 at Guatemala City, the text of a new and far reaching Inter-American model law is expected to be approved. Carrying an OAS imprimatur, such a model national law if it tracks modern finance standards may be promoted by the IADB, the World Bank and others, which could lead to sufficient adoption to change the financing landscape in the Americas. Even short of such implementation, the conclusion of such an OAS model may lead to changes in existing laws and accepted practices. The draft text covers creation, validity and enforcement and is compatible with current modern secured financing. Following a drafting meeting of 12 OAS states in Miami last November, a new draft of the model law is expected by September 2001, drawing in part on recent legislative developments in Mexico and principles prepared by the National Law Center for Inter-American Free Trade (NLCIFT) at Tucson, Arizona. This text is also expected to include proposed enabling rules for electronic commerce in order to facilitate implementation of the model law.

### **Hague Conference: Draft convention on law applicable to securities intermediaries**

Begun recently in January 2001, this project is an effort to fast-track an agreement on rules on choice of law and applicable law with regard to the movement of and custody of holdings of dematerialized securities, generally reflecting principles in UCC Article 8, and held as collateral by securities intermediaries. The expansion of this commercial mechanism in a number of countries has considerably increased the potential for cross-border use of collateral, enhancing opportunities for investment, credit extension and transactions, but raising at the same time both transactional risk and systemic risk concerns, given the current absence of agreed international rules both on applicable law and substantive law.

In order to fit 1990's legal concepts, at least in some countries, of computer-based rights in securities holdings, tentative consensus has been reached on the so-called "Prima" rule for applicable law, centered on the location of the relevant intermediary, and not on older *lex situs* or "look through" rules. Agreement on matters such as the location of accounts or dematerialized securities, however, which would be a key factor in determining *ex ante* the applicable law, has proved so far quite difficult. U.S. and many industry participants want as close to a full party autonomy rule as possible, in part because of the often rapid movement of securities and accounts in computer format, while a number of EU participants and some others favor a more restrictive nexus requirement to any choice of law. The manner in which this issue is resolved will determine whether the proposed treaty system will have value. Consultations with industry, governmental regulators and others are expected to continue through the fall, and if the gap can be closed, the next meeting at The Hague may take place in January, 2002 and may advance to governmental negotiations later in 2002.

### **UNCITRAL: International Project Finance**

UNCITRAL completed in July 2000 a multi-year project on a Legislative Guide for privately financed infrastructure projects. An important mechanism for major projects, especially in devel-

oping countries, it reflects a movement away from bilateral and multilateral government funding and control and toward greater reliance on private sector financing, development and operation of a variety of infrastructure needs, from ports and roads to power and public facilities. In order to secure capital market finance, a balance is required between longer term financing and management, greater assurances of rights to obtain adequate returns and repatriate proceeds, and still achieve a balance with project country regulation and specification of public services. The Guide covers legislative frameworks, award of concessions, project risks and government support, financial arrangements, disputes and other matters.

Meetings took place at Vienna in July on possible future work, followed by approval at the UNCITRAL plenary session of a new project on legislative guidance to begin late this September. The leading proposal on the table is to expand the work done on selection of concessionaires, including model provisions.

#### **UNCITRAL: Future work on a UN secured financing model law**

After extended debate, the Commission agreed in July 2001 to initiate work on a model law focused on financing of commercial goods, including inventory financing. Notwithstanding approval at the same session of the potentially far-reaching Convention on Receivables Financing, a number of delegations expressed caution about further UN imprimatur on similar modern financing laws, which would go further by potentially dealing with priorities and enforcement. The IMF, the World Bank, the ICC, the EBRD and others supported the new project, along with the CFA and other industry based NGO's (non-government organizations represented in these meetings, which now includes the ABA).

#### ***Insolvency law reform***

Bankruptcy law reform in the last several years has been recognized by many institutional parties such as the World Bank, the IMF, the Asian Development Bank and others as a front-line issue for both improving access to capital markets, providing access to

restructuring financing, and limiting systemic risk. The status and functioning of bankruptcy systems thus are now important factors in both transactional and country risk assessments, and have a direct bearing on commerce and credit ratings, especially in major developing countries. Resisted by many as a topic for harmonization in the mid-1990's, progress has moved ahead in recent years.

### **U.S. Bankruptcy bill and the UNCITRAL Model Law**

Included in the Bankruptcy Reform Bill now pending in Congress is a new chapter 15 on cross-border insolvency cases, which would replace existing sections 304, 305 et seq. of U.S. Code Title 11. Chapter 15 essentially adopts the UNCITRAL Model Law on Cross-Border Insolvency approved by the UN General Assembly in 1997, and covers access of foreign representatives and administrators to initiate or participate in proceedings, recognition of main proceedings, limited automatic stays, equal treatment for foreign and domestic parties, authorization for cross-border cooperation between administrators and courts, and other matters. Passage of the bill has been held up for two years because of controversy on consumer provisions unrelated to the cross-border chapter. It is hoped that adoption by the U.S. will lead other countries to consider similar action (Mexico has already done so).

### **UNCITRAL: Preparation of a UN legal guideline and model provisions for cross-border and domestic insolvency reform.**

Following a successful completion of the 1997 UNCITRAL model law on procedural aspects of cross-border insolvency, the U.S., the ABA, the IBA, Insol and a number of international finance bodies have supported further work by UNCITRAL towards preparation of a legal guide for substantive insolvency law reform. A December 2000 Colloquium in Vienna included commercial sector groups, insolvency practitioners and the judiciary, and set the stage for preparation of working documents on which an unexpected degree of initial consensus was by a Working Group on Insolvency Law of approximately 50 countries, NGO's and

others at the UN in New York, whose deliberations concluded earlier this week.

Topics covered included access to proceedings, opening of proceedings, operation of stays, different approaches to secured financing rights, role of creditors' committees, directors' rights and liabilities, avoidance powers, and other matters. Much greater recognition of reorganization and refinancing as an option, together with initial acceptance of changes to otherwise applicable standards often necessary to permit such developments, resulted from the meeting, which indicated a significant shift of opinion over the last several years. Included in this change was placing the proposals put forward by the U.S., the ABA and others for additional options for "accelerated procedures" clearly in the main text and as a lead-in to the new chapters on reorganization. These procedures, modeled to some extent on "pre-packs" in U.S. bankruptcy practice, would allow pre-agreed workouts for money debt, with capacity to bind holdouts, to proceed without delay and with limited stays and accelerated court supervision.

Parallel to, and responsible in part for this work, has been the preparation of reform proposals by the IMF, the World Bank, the Asian Development Bank and other IFI's. A revised UN text will be available in September 2001 for comment and will be again taken up by the Working Group in December 2001 and May 2002. This project could bring significant benefits to many countries, as well provide some hedge against systemic risks in countries where absence of an efficient legal system for recycling assets has been a factor in serious economic downturns in recent years.

### **Non-governmental projects: ALI, IBA, INSOL, III**

Each of these organizations has underway efforts to develop new rules or studies and other efforts to promote harmonization or bankruptcy reform. The ALI has produced a three-country effort involving Canada, the U.S. and Mexico which resulted in publication of up-to-date surveys of bankruptcy practice as well as law for each country, and is pursuing areas of possible harmonization. The other organizations referred to are involved in the UNCITRAL Working Group discussed above.

### *Electronic Commerce*

While clearly a modern technology, law and commercial practice field, globalization in other respects has not produced the same degree of commonality nor promoted harmonization. This in part may reflect uncertainties in assessing how law changes impact markets and commercial practice, especially in the absence of a track record in the markets, as well as wide differences between the U.S. and the EU, as well as others, on a range of matters such as the degree to which governments should regulate the new field, or conversely enact only minimal enabling rules (the U.S. approach in large measure), as well as differences on rights in data, commercial vs. privacy rights, software licensing rights, electronic signatures and related matters.

### **1996 UNCITRAL Model Law on Electronic Commerce**

The Model Law, negotiated with U.S. support, contains enabling provisions intended to validate actions using electronic communications in commercial transactions, and rules on computer equivalents to written signatures, originals, etc. While adopted several years ago, it is referred to here because it has been used as a basis for many national laws, including provisions in U.S. federal and state law, and referred to directly in the recently enacted Federal e-signature. An exception to that has been the few provisions on attribution and presumptions, which although drawn from earlier laws on electronic funds transfers, have for the most part been seen within the U.S. as not appropriate for general commercial transactions, until an established track record for e-commerce is achieved and the effect of such provisions can be anticipated. Congress has stated that relevant provisions of the Model law should be the basis of further negotiations internationally.

### **UNCITRAL: Model law on electronic signature and message authentication systems**

This project, underway for several years and controversial, was completed at the 2001 July plenary session. Initially modeled on earlier PKI-based legal concepts, the U.S. had continued to express



concern about lack of technology neutrality, rules that could invite over regulation, and provisions on liability. Substantial improvements were made over the last year, including revisions to the liability rules sought by the U.S. While more improvements could have been made, given the likelihood that most states will not adopt the U.S. minimalist approach, the text now may represent a better model for those countries who have not yet adopted e-signature laws than other leading models, such as the EU Directives.

The Model law began with a focus on the then leading applications of digital signature technology, which, while a very important technology for certain purposes, in the view of some should not be a standard for general commercial communications. Related disputes are reflected in domestic differences within the U.S., as seen in the different approaches in recent legislation such as UETA, UCITA, the Federal "E-signature" Act, and earlier state legislation such as the Illinois statute.

### **Future E-commerce work**

Putting the several last years' conflicts on e-signatures behind, decisions were made several weeks ago in July at UNCITRAL on proposals for new E-com work, based on the recommendations of the E-Commerce Working Group which met in March. Priority will be given to international rules on formation of contracts, which would cover tangible goods but defer work on "virtual" goods, until more consensus can build up on how to treat the intersection between traditional sales and commercial laws on the one hand, and intellectual property rights, including rights in data and software licenses on the other. While not tied at this stage to the UN's Vienna Convention on contracts for the international sale of goods (CISG), the relationship will have to [be] worked out, which potentially may raise issues recently confronted by NCCUSL and the ALI on e-com legislation and proposed revisions to UCC Article 2.

Other leading projects approved but not on the same priority were interpretative agreements or other methods of revision of a potentially large number of existing conventions or bilateral arrangements to reflect new e-commerce realities, and rules on transferability of rights by cross-border computer systems.

### **UNIDROIT: New E-Com provisions for the UNIDROIT Principles for International Commercial Contracts**

The UNIDROIT “Principles,” released in 1995, have found wide application in cross-border contract practice and in commercial arbitration, as a neutral substitute for conflicting national contract laws. The “Principles” draw both from common law and civil law, and reflect many developments in the UCC as well. Provisions cover formation, validity, performance and non-performance, damages, etc. This product has contributed significantly to harmonization, although it is noted that partly in response a separate document on European Principles has been in preparation.

UNIDROIT is now at a preliminary stage in its project to add new chapters, including sections on assignments, third-party beneficiary rights, e-commerce and other matters. While provisions on assignments would hopefully draw on the recent conventions and international texts concluded this year, given the uncertainties noted above on e-commerce, achieving consensus on e-rules which support commercial transactions may be a challenge.

Possible work on on-line dispute resolution for the internet and other computer media may also be considered as a joint effort with the UNCITRAL Working Group on international commercial arbitration, which will be covered in a separate report on PIL developments on dispute resolution, including the status of the draft Hague Convention on jurisdiction and enforcement of foreign judgments.

### ***International Franchising***

#### **UNIDROIT: Draft model national law on international franchising**

The Institute completed in 1998 a Guide to International Master Franchise Agreements, the first such international product in the field. Using that as a basis, UNIDROIT held its first intergovernmental meeting at Rome in June 2001 on a new draft model national law on franchising disclosures in cross-border arrangements. Unlike most of the projects described herein, which generally seek agreement on default rules that can govern the substance

of transactions, the preliminary draft model law, which was prepared by a group of private sector experts, is expected to apply only to pre-sale disclosures by franchisers to prospective franchisees.

The proponents do not seek to apply its provisions to the substantive relationship between franchisor and franchisee, nor to third parties. Most countries, as well as many states of the U.S., have little specific regulation of the franchising relationship. This is an example where disharmony on substantive rules has not been shown to create dislocation of the market, unlike the absence of agreed rules on sales of goods. Absence of disclosure rules, however, has been seen as a potential pitfall, as franchise operations and especially franchise investment are taking on a global cast. Although completion has been seen as possible in 2002, it is too early to assess that until a second meeting is convened at Rome in the Spring 2002. Differences have emerged between countries which seek only minimal general obligations of disclosure, leaving many standards to be determined by applicable law, and others such as the U.S. which seek more fully articulated standards and exceptions, which arguably would enhance certainty and transparency across borders.

### *Transportation of goods*

#### **OAS: Draft uniform bill of lading and rules for Inter-American shipments**

Agreement on an Inter-American uniform bill of lading for overland transportation of goods will be sought this November at the OAS-sponsored Sixth Specialized Conference on Private International Law (CIDIP-VI) to be held in Guatemala City. The U.S., acting as Chair of the CIDIP drafting group, has compiled practices from a number of OAS states which will be circulated in September along with draft rules.

Various models have been used for the proposed rules, including new draft private sector rules developed for road shipments between the NAFTA states, developed by industry representatives from Canada, the U.S. and Mexico under the auspices of the North American Surface Transportation Committee of the National Law Center for Inter-American Free Trade (NLCIFT) at

Tucson, Arizona. In view of the wide disparity between both law (including civil law and common law) and transportation practices in the three countries that had to be overcome, either by substantive rules or applicable law pointers, the draft North American road bill of lading may be a starting format for Inter-American issues. The draft rules would also draw on the earlier 1989 CIDIP-produced Convention on overland transportation of commercial goods.

If completed in November, discussion may begin on possible expansion of the harmonization project for a second phase. In order to be of value to all regions of the Americas, discussions are underway on the feasibility of extending this to inter-coastal shipping in the Americas, and possibly other modes of transportation. The decision whether to proceed with such a project may depend on the extent of Latin American participation in a second project initiated this year, discussed below.

### **CMI and UNCITRAL: Rules for international bills of lading, liability and other matters for ocean carriage of goods by sea**

The Comité Maritime International (CMI) in Brussels and UNCITRAL have cooperated, along with the Maritime Law Associations of a number of countries, in preparing draft approaches to a new effort to unify the long-fractured field of rules on carriage of goods by sea. UNCITRAL approved the project last month, and scheduled the first meeting for the Spring 2002, which would have on the table a draft convention prepared by CMI which is expected to be distributed for comment in December 2001. The U.S. has maintained that such a project should include all issues covered by standard bill of lading laws, and not be limited to liability standards or limits, as have some earlier international efforts, a position upheld at UNCITRAL.

The new project will not be aimed at multimodal shipping, although this is not ruled out at a later stage. Other bodies continue in separate projects to seek multimodal rules, such as UNCITAD and the UNECE, but this approach was rejected by the U.S. and others as an unreachable goal at this stage, since it would require cooperation of the other modes such as rail and road, as well as their respective industries and users.

An opportunity for broader harmonization presents itself for the U.S., in that concurrently new COGSA legislation drafted by the MLA may be introduced in Congress to amend domestic U.S. maritime law on this subject, and the corresponding provisions of the UCC (Article 7 on bills of lading) are now also being considered for revision. This will permit both domestic and international legal issues—which are becoming increasingly hard to separate—to be on the table, which can be beneficial to import-export, shipping and transportation finance interests if wider harmonization occurs.

### *Commercial dispute resolution*

While a separate topic which will be covered in other reports, it is referred to briefly here because of its importance to commercial and transactional law, and because harmonization has been sought in the same international bodies.

### **Hague Conference: Draft convention on jurisdiction and enforcement of judgments**

The draft judgments convention, which includes proposed rules on jurisdiction, is moving toward a decision point next January at The Hague as to whether it will proceed, and whether the U.S. is able to support it. Intercessional meetings are continuing in an effort to seek consensus on core issues and to build out from that, rather than focus first on the EU's Brussels/Lugano treaty system as the starting point, which has not been acceptable to the U.S., ATLA and others. In addition, U.S. led efforts continue on seeking appropriate coverage for electronic commerce and related intellectual property cases, which present difficult challenges not on the table at the time this project started years ago. Outside of this project, the U.S. is not a party to any bilateral or multilateral agreements on enforcement of judgements, as contrasted with U.S. participation in the widely adopted UN New York Convention on foreign arbitral awards and the OAS Panama convention on commercial arbitration.

**UNCITRAL: International commercial arbitration**

The Working Group on Arbitration has begun work this year on model legislative provisions on conciliation, enforceability of interim awards and measures of protection, enforceability of awards set aside in the state of origin, and interpretations of the New York Convention on Foreign Arbitral Awards so that treaty requirements for written arbitration agreements are satisfied by electronic communications. Meetings will be held in Vienna and New York in November 2001 and the Spring of 2002.

**UNIDROIT and ALI: Joint project on rules for dispute resolution**

The joint project continues its effort to merge civil law and common law approaches to dispute resolution, which could lessen the burden of cross-border cases and reduce conflict in arbitration and other ADR cases where basic rules of procedure are often in dispute. The status of this project will be reviewed this September at the UNIDROIT meeting of its Governing Council.

**2. Adoption of Conventions and Model Laws****a. UNIDROIT***Convention on International Interests in Mobile Equipment and Protocol on Matters Specific to Aircraft Equipment*

On November 16, 2001, in Cape Town, South Africa, a conference convened jointly by UNIDROIT and the International Civil Aviation Organization ("ICAO") adopted the Convention on International Interests in Mobile Equipment ("Convention") and a Protocol on Matters Specific to Aircraft Equipment. Both of these Conventions are discussed in the speech provided in A.1. *supra*. The Convention will entitle those who finance mobile equipment internationally to obtain a security interest that is superior to any others, with some exceptions, in contracting states. It will also establish a new

worldwide computer-based registration system for security interests obtained under the Convention.

Other protocols will be negotiated to cover financing of rail equipment, space equipment and services, and eventually other categories such as construction and agricultural equipment. The views of the United States on the space equipment protocol are provided in Chapter 12.B.5. *supra*.

The interests of the United States in actively participating for four years in the negotiation of the Convention and Protocol were summarized in a memorandum recording its successful completion, excerpted below.

The full text of the memorandum is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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\* \* \* \*

The Convention will extend the basics of modern financing law, already in place in the United States and some other countries, to other world markets, thus facilitating U.S. exports in the sectors covered by its protocols. Developing countries will benefit by gaining new access to capital markets and by expanding their aviation and transportation infrastructure at a lower cost.

A primary objective of the Convention and Protocol will be to lower financing costs for commercial aircraft, a key U.S. export. The global market for aircraft over the next 20 years is pegged at \$1.2 trillion. The accord is expected to bring cost savings to airlines, mainly in the developing world, on the order of \$5 billion annually. . . . An industry group, led jointly by Boeing and Airbus, met this week in Seattle to assess the Convention and Protocol; it is considering urging early signature and ratification.

\* \* \* \*

## **b. UNCITRAL**

### *(1) Model Law on Electronic Signatures*

The UNCITRAL Model Law on Electronic Signatures, also discussed in A.1. *supra*, was adopted on July 5, 2001. The United States supports this effort, as a model for adoption,

for those countries that do not plan to follow the U.S. legislative model of minimal enabling statutes on electronic commerce.

(2) *Convention on Assignment in Receivables Financing.*

As noted in the speech in A.1., *supra*, the plenary session of UNCITRAL adopted the Convention on Assignment in Receivables Financing in July 2001 in Vienna. As anticipated, the UN General Assembly endorsed the text in December 2001 and opened it for signature and ratification.

### 3. Future Undertakings

#### *Electronic Commerce*

On July 21, 2001, the office of Private International Law circulated memorandum to members of the Secretary of State's Advisory Committee on Private International law and other interested persons seeking their views on potential new undertakings in the area of Electronic Commerce. A list of recommendations under consideration and general comments on the field are provided in the excerpts below.

The text is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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\* \* \* \*

The following list is drawn from recommendations already received. *Except* for the first item, it does *not* indicate support by our Office or any other agency of government at this time. It *also does not include matters already in progress* at the OECD, UNIDROIT, ITU, UNCITRAL, WIPO and others, including electronic registries, data security, privacy rights, message authentication and electronic signature systems, patent submission rights, etc. Some general comments follow the list.

*Proposed convention on basic ground rules to enable ECom:*

The U.S. continues to support negotiation of a convention which would embody many provisions of the 1996 UNCITRAL



Model Law on Electronic Commerce, along with several basic principles such as party autonomy, and thus achieve an enabling but otherwise minimalist approach to international rules, at least for the short term. Support has grown through bilateral contacts, although a multilateral forum has not yet emerged.

A second avenue for this effort could be proposed new provisions on ECom for the 1994 UNIDROIT Principles of International Commercial Contracts. A recent initial draft indicates that many provisions are proposed to be drawn from the UNCITRAL Model Law.

*Electronic transactional and contract law:*

An expansion of the UNCITRAL Model Law on ECom has been proposed, which could encompass a number of electronic contracting law issues, drawing on provisions of the new UETA, the stand-alone law that may replace draft UCC 2B, various provisions that have been proposed for revisions of other UCC Articles, as well as provisions of newer codes in other countries that support ECom.

*Electronic transfer of rights to tangible goods:*

Transfers of rights by computer while goods are in transit, warehoused or otherwise available today occurs largely within closed or limited access network systems and within narrowly defined sectors. It has been proposed that a wide area of trade in goods could take place if supported by an appropriate international framework for electronic bills of lading, title documents or security interest transfers. Such a system could build on the EU's Bolero experience, Canadian electronic registries, the 1991 UN convention on transport terminals, etc.

*Electronic transfer of intangible rights:*

Electronic letters of credit, standbys, bank guarantees and other documents may need new international understandings to assure transferability/enforceability of rights by computer. A related topic might cover electronic money, such as Mondex, E-cash, etc., taking into account the resolution of computer and systems issues in the operation of electronic funds transfer (EFT) systems.

Electronic clearance and settlement between regulated and unregulated markets in various countries could also be considered as a separate topic in this category, drawing on experience

under the new UCC Article 8, as well as electronic market systems online in several countries.

*Standard terms for electronic commerce:*

Differing terms and usages in various jurisdictions have created problems in efforts to align new rules or practice standards. Work is underway on ECom terminology at organizations such as the ICC, along the lines of INCOTERMS (proposed "E-Terms," Guidec, etc.); at ANSI and the UNECE's work on standardized EDI message sets; and through newer private sector bodies such as the Internet Law and Policy Forum (ILPF). Some have suggested that broadening those efforts and adding other fora where appropriate may move up time schedules for implementation.

*Rights in electronic data and software:*

Building on the recent success at the World Intellectual Property Organization (WIPO) which revised certain international copyright standards to take into account electronic data and rights, it has been suggested that further work be sought on rights in data, software licensing and electronic contracting that are currently under consideration for the proposed new Uniform state law that will replace draft UCC Article 2B. Will completion of work by NCCUSL this summer move this topic up on the feasibility scale?

*Jurisdiction and applicable law:*

Many issues have arisen as well as a growing body of jurisprudence in the U.S. and some other countries over the last two years, but few internationally recognized answers exist when computer messaging and party interactions take place across territorial borders. Suggestions grow for the need for consensus on legal ground rules, and preliminary work is or will be underway at ILPF, the Hague Conference, possibly the OAS and UNCITRAL, the ABA's Cyberspace Law committee and Science & Technology section, as well as other bodies.

Within what limits should we support any or all of these efforts, or should we seek to expand the venues? Are current trends toward party autonomy and non-nexus choice of law appropriate? Should economic and transactional results be the litmus test, as they are in current negotiations on commercial law treaty regimes? There may need to be different jurisdictional and applicable law pointers for specific commercial and trade sectors, personal and consumer rights enforcement, regulatory or other

governmental oversight functions, etc.

*Virtual magistrates and on-line dispute settlement systems:*

While various proposals for on-line methods of dispute resolution have been advanced, none have so far gained wide usage. It has been suggested that, in the absence of domestic and cross-border agreements as to enforceability, procedural standards, and possibly party-based jurisdiction, progress may continue to be slow in this area, which could become an important factor in extensions of internet and on-line commercial systems. Application of existing conventions, regulations or court decisions regarding arbitration, consumer rights, or related areas of the law are largely uncertain. Might promotion of work on this topic advance the likelihood of some resolution early in the 21st century?

*Omnibus protocol to amend existing multilateral and bilateral treaty regimes:*

A number of treaty and convention regimes negotiated in prior years did not contemplate electronic communications or computer technologies, and their application may be problematic unless agreed understandings of existing terms or amendments to various provisions are entered into. It has been suggested that we encourage one or more international bodies to examine existing treaties, and prepare omnibus protocols. States that ratify or adopt such protocols would change their treaty relations with other states that have so acted.

### **General comments:**

International developments on the electronic commerce (Ecom) front are at a crossroads, and raise problems which may blur the line between public and private law. The economics of and globalization of commerce and telecommunications, and the opening up of ECom trade and services between countries and distant parties previously limited in their ability to engage in direct commerce, are pushing the need for new legal standards and new concepts of jurisdiction. The concept of physical "territory" as the basis either for regulation or application of law is itself proving to be difficult to apply in some cases. Existing "direct effects" theories for extraterritorial application of national laws may also no longer work.

In recent years, public law initiatives in this field have rested on expansion of trade, including liberalization of trade in services; deregulation of telecommunications; U.S. proposed restraints on taxation of cross-border internet commerce, as well as avoidance of over-regulation, to allow market forces to determine future commercial and technological patterns; and benign acceptance up to this point of cross-border company operations, such as credit card systems, without agreement as to underlying territorial legal differences. Gaps, at least for now, have however grown between the EU and the US, on the intersection of electronic commerce and data rights, consumer protection, security standards, message authentication, cryptology export, and national security and law enforcement. These gaps are generating standoffs in international bodies such as the OECD, making consensus on common standards difficult. In turn, if these gaps remain, substantial progress on ECom at organizations such as the WTO and UNCITRAL may prove difficult.

Multilateral negotiations on private law unification, for example, produced significant progress at UNCITRAL on international electronic funds transfers in 1992 and the now widely used UN Model Law on Electronic Commerce in 1996. As the unresolved problems in the public law arena however now begin to merge with private law issues, progress on the private law front has bogged down, as has been seen at the OECD and UNCITRAL with regard to work on electronic and digital signature systems.

As with the OECD, the biggest divide at UNCITRAL is between the “free market” states, including the U.S., who seek laws that leave wide room for market forces to drive commerce in a computer age, versus some EU, Asian and other states, who seek to substantially regulate this new commercial arena. Efforts to promote regulation in turn are often premised on acceptance of a particular technology, a development that the U.S. also opposes.

### **Cross-References**

*Hague Convention on International Child Abduction*, Chapter 2.B.1.

*Reciprocal Child Support Enforcement Arrangements*, Chapter 2.B.2.

*Protocol on Space Equipment*, Chapter 12.C.5.

## CHAPTER 16

### Sanctions

PRELIMINARY NOTE: Sanctions issues related to the response of the United States to the terrorist attacks of September 11, 2001, are discussed in Chapter 19.

#### **A. ROUGH DIAMONDS FROM SIERRA LEONE**

##### **1. Prohibition on Importation from Sierra Leone**

On July 5, 2000, the United Nations Security Council adopted Resolution 1306, which determined that the situation in Sierra Leone constituted a threat to international peace and security in the region and expressed concerns regarding the role played by the illicit trade in diamonds in fueling the conflict in Sierra Leone. U.N. Doc. S/Res/1306 (2001). The Resolution called on states to take the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory. Excerpts from Executive Order 13194, issued by President William J. Clinton on January 18, 2001 to implement the Resolution, are provided below. 66 Fed. Reg. 7389 (Jan. 23, 2001).

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By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act of 1945,

as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution 1306 of July 5, 2000,

I, WILLIAM J. CLINTON, President of the United States of America, take note that the people of Sierra Leone have suffered the ravages of a brutal civil war for nearly 10 years, and that the United Nations Security Council has determined that the situation in Sierra Leone constitutes a threat to international peace and security in the region and also has expressed concerns regarding the role played by the illicit trade in diamonds in fueling the conflict in Sierra Leone. Sierra Leone's insurgent Revolutionary United Front's (RUF's) illicit trade in diamonds from Sierra Leone to fund its operations and procurement of weapons, the RUF's flagrant violation of the Lome Peace Agreement of July 7, 1999, and its attacks on personnel of the United Nations Mission in Sierra Leone are direct challenges to the United States foreign policy objectives in the region as well as a direct challenge to the rule-based international order which is crucial to the peace and prosperity of the United States. Therefore, I find these actions constitute an unusual and extraordinary threat to the foreign policy of the United States and hereby declare a national emergency to deal with that threat. In order to implement United Nations Security Council Resolution 1306 and to ensure that the direct or indirect importation into the United States of rough diamonds from Sierra Leone will not contribute financial support to aggressive actions by the RUF or to the RUF's procurement of weapons, while at the same time seeking to avoid undermining the legitimate diamond trade or diminishing confidence in the integrity of the legitimate diamond industry, I hereby order:

Section 1. Except to the extent provided in section 2 of this order and to the extent provided in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective date of this order, the direct or indirect importation into the United States of all rough diamonds from Sierra Leone on or after the effective date of this order is prohibited.

Sec. 2. The prohibition in section 1 of this order shall not apply to the importation of rough diamonds controlled through the Certificate of Origin regime of the Government of Sierra Leone.

Sec. 3. Any transaction by a United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited.

Sec. 4. For the purposes of this order:

\* \* \* \*

(d) the term “rough diamond” means all unworked diamonds classifiable in heading 7102 of the Harmonized Tariff Schedule of the United States; and

(e) the term “controlled through the Certificate of Origin regime of the Government of Sierra Leone” means accompanied by a Certificate of Origin or other documentation that demonstrates to the satisfaction of the United States Customs Service (or analogous officials of a United States territory or possession with its own customs administration) that the rough diamonds were legally exported from Sierra Leone with the approval of the Government of Sierra Leone.

\* \* \* \*

**2. Prohibition on Importation from Liberia**

On May 22, 2001, in Executive Order 13213, President George W. Bush, consistent with UN Security Council Resolution 1343, noted the key role of Liberia in the export of the Revolutionary United Front’s diamonds from Sierra Leone. 66 Fed.Reg. 28829 (May 24, 2001). The Order banned all import of diamonds from Liberia, effective May 23. The excerpts from the Executive Order provided below explain the basis for the decision.

\* \* \* \*

I, GEORGE W. BUSH, President of the United States of America, take note that in Executive Order 13194, the President responded to, among other things, the insurgent Revolutionary

United Front's (RUF) illicit trade in diamonds to fund its operations in the civil war in Sierra Leone by declaring a national emergency and, consistent with United Nations Security Council Resolution 1306, by prohibiting the importation into the United States of all rough diamonds from Sierra Leone except for those importations controlled through the Certificate of Origin regime of the Government of Sierra Leone. United Nations Security Council Resolution 1343 takes note that the bulk of RUF diamonds leaves Sierra Leone through Liberia and that such illicit trade cannot be conducted without the permission and involvement of Liberian government officials at the highest levels; determines that the active support provided by the Government of Liberia for the RUF and other armed rebel groups in neighboring countries constitutes a threat to international peace and security in the region; and decides that all states shall take the necessary measures to prevent the importation of all rough diamonds from Liberia, whether or not such diamonds originated in Liberia. The Government of Liberia's complicity in the RUF's illicit trade in diamonds and its other forms of support for the RUF are direct challenges to United States foreign policy objectives in the region as well as to the rule-based international order that is crucial to the peace and prosperity of the United States. Therefore, I find these actions by the Government of Liberia contribute to the unusual and extraordinary threat to the foreign policy of the United States described in Executive Order 13194 with respect to which the President declared a national emergency. In order to deal with that threat and to ensure further that the direct or indirect importation into the United States of rough diamonds from Sierra Leone will not contribute financial support to further aggressive actions by the RUF or to the RUF's procurement of weapons; to implement United Nations Security Council Resolution 1343; and to counteract, among other things, the Government of Liberia's facilitation of and participation in the RUF's illicit trade in diamonds through Liberia, I hereby order the following additional measures be taken with respect to prohibiting the importation of rough diamonds from Sierra Leone:

Section 1. Except to the extent provided in regulations, orders, directives, or licenses issued pursuant to this order, and notwithstanding the existence of any rights or obligations conferred or



imposed by any international agreement or any contract entered into or any license or permit granted prior to the effective date of this order, the direct or indirect importation into the United States of all rough diamonds from Liberia, whether or not such diamonds originated in Liberia, on or after the effective date of this order is prohibited.

\* \* \* \*

## **B. THE TALIBAN—PRIOR TO SEPTEMBER 11, 2001**

The United Nations Security Council adopted Resolution 1333 on December 19, 2000, requiring states to impose additional sanctions on the Taliban regime in Afghanistan and on Osama bin Ladin, including associated individuals and entities such as Al-Qaeda. U.N. Doc. S/Res/1333 (2000). Additional requirements took effect on January 19, 2001 for a one-year period.

Resolution 1333 deplored the fact that the Taliban continued to provide safe haven to Osama bin Ladin and allowed him and others associated with him to operate a network of terrorist training camps from Taliban controlled territory and to use Afghanistan as a base from which to sponsor international terrorist operations. It also condemned the Taliban for continuing to use the areas of Afghanistan under its control to shelter and train other terrorists and plan terrorist acts, including the capture of the Iranian Consulate-General and murder of Iranian diplomats and a journalist. Citing the United States' indictment of Osama bin Ladin and his associates for the August 7, 1998 bombings of the United States embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, and for conspiring to kill American nationals outside the United States, and other terrorist incidents, the Security Council determined that the failure of the Taliban authorities to respond to repeated Security Council demands in this regard constituted a threat to international peace and security.

In addition to the restrictions that the Security Council had previously imposed under its Resolution 1267 of October 15, 1999, Resolution 1333, among other things, requires states: 1) to prevent the direct or indirect supply, sale and

transfer by their nationals, from their territories, or using their flag vessels or aircraft, of arms and related materiel of all types to the territory of Afghanistan under Taliban control, as well as of technical advice, assistance or training related to the military activities of the armed personnel under Taliban control; 2) to close immediately and completely all Taliban offices in their territories, as well as all offices of Ariana Afghan Airlines; 3) to prevent the sale, supply or transfer by their nationals or from their territories of the drug precursor chemical acetic anhydride to any person in the territory of Afghanistan under Taliban control; 4) to deny permission to any aircraft to take off from, land in or over-fly their territory, if that aircraft has taken off from, or is destined to land in, a place in the territory of Afghanistan under Taliban control (subject to certain approved exceptions); and 5) to freeze the funds and financial assets of Osama bin Ladin and those associated with him, including those in the Al-Qaeda organization, as designated by the sanctions committee established pursuant to UNSCR 1267.

On January 11, 2001, the Office of Foreign Assets Control, U.S. Department of the Treasury, issued an interim rule amending provisions relating to the registration of non-governmental organizations in the Reporting and Procedures Regulations (31 CFR Part 501 (2001)) and Sudanese Sanctions Regulations (31 CFR Part 538 (2001)) to require registration of nongovernmental organizations seeking permission to perform humanitarian and religious activities otherwise prohibited in geographic areas subject to economic sanctions. The rule also issued the Taliban (Afghanistan) Sanctions Regulations (31 CFR Part 545) to implement President Clinton's declaration of a national emergency and imposition of sanctions against the Taliban in Executive Order 13129 of July 4, 1999. 66 Fed.Reg. 2726 (Jan. 11, 2001). Further developments following the attack on the United States of September 11, 2001, are discussed in Chapter 19. The Taliban Sanctions Regulations are described in the January 11 notice as follows:

On July 4, 1999, the President issued Executive Order 13129 (64 FR 36759, July 7, 1999), declaring a national emergency with respect to the actions and policies of the Taliban in Afghanistan and invoking the authority of, *inter alia*, the International Emergency Economic Powers Act, 50 U.S.C. 1701–1706 (“IEEPA”). The order blocks all property and interests in property of the Taliban that are in the United States, that are or hereafter come within the United States, or that are or hereafter come within the possession or control of U.S. persons, including overseas branches of U.S. entities. The order also prohibits trade with the Taliban or involving the territory of Afghanistan controlled by the Taliban. The order authorizes the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to take such actions, including the promulgation of rules and regulations, as may be necessary to carry out the purposes of the order. On October 15, 1999, the United Nations Security Council issued Resolution 1267 which, among other things, directs member states to freeze funds and other financial resources of the Taliban (effective November 14, 1999). To implement Executive Order 13129, and consistent with United Nations Security Council Resolution (“UNSCR”) 1267, the Office of Foreign Assets Control of the U.S. Department of the Treasury is promulgating the Taliban (Afghanistan) Sanctions Regulations, 31 CFR Part 545 (the “Regulations”).

\* \* \* \*

## C. WESTERN BALKANS

### 1. Lifting and Modifying Certain Sanctions with Respect to the Federal Republic of Yugoslavia (Serbia and Montenegro)

On January 17, 2001, President William J. Clinton issued Executive Order 13192, prospectively lifting economic sanctions against the Federal Republic of Yugoslavia (Serbia and Montenegro), while blocking the property and interests in property of specified persons and prohibiting certain transactions or dealings involving such blocked property. 66 Fed. Reg. 7379 (Jan. 23, 2001). Excerpts from the Executive Order are provided below.

\*   \*   \*   \*

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution 827 of May 25, 1993 (UNSCR 827), and subsequent resolutions,

I, WILLIAM J. CLINTON, President of the United States of America, found in Executive Order 13088 of June 9, 1998, that the actions and policies of the Governments of the Federal Republic of Yugoslavia (Serbia and Montenegro) (the “FRY (S&M)”) and the Republic of Serbia with respect to Kosovo, by promoting ethnic conflict and human suffering, threatened to destabilize countries of the region and to disrupt progress in Bosnia and Herzegovina in implementing the Dayton peace agreement, and therefore constituted an unusual and extraordinary threat to the national security and foreign policy of the United States. I declared a national emergency to deal with that threat and ordered that economic sanctions be imposed with respect to those governments. I issued Executive Order 13121 of April 30, 1999, in response to the continuing human rights and humanitarian crises in Kosovo. That order revised and substantially expanded the sanctions imposed pursuant to Executive Order 13088.

In view of the peaceful democratic transition begun by President Vojislav Kostunica and other newly elected leaders in the FRY (S&M), the promulgation of UNSCR 827 and subsequent resolutions calling for all states to cooperate fully with the International Criminal Tribunal for the former Yugoslavia, the illegitimate control over FRY (S&M) political institutions and economic resources or enterprises exercised by former President Slobodan Milosevic, his close associates and other persons, and those individuals’ capacity to repress democracy or perpetrate or promote further human rights abuses, and in order to take steps to counter the continuing threat to regional stability and implementation of the Dayton peace agreement and to address the

national emergency described and declared in Executive Order 13088, I hereby order:

Section 1. Amendments to Executive Order 13088. (a) Section 1 of Executive Order 13088 of June 9, 1998, as revised by section 1(a) of Executive Order 13121 of April 30, 1999, is revised to read as follows:

“Section 1. (a) Except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)), and in regulations, orders, directives, or licenses that may hereafter be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby order blocked all property and interests in property that are or hereafter come within the United States or that are or hereafter come within the possession or control of United States persons, of:

- (i) any person listed in the Annex to this order; and
- (ii) any person determined by the Secretary of the Treasury, in consultation with the Secretary of State:

(A) to be under open indictment by the International Criminal Tribunal for the former Yugoslavia, subject to applicable laws and procedures;

(B) to have sought, or to be seeking, through repressive measures or otherwise, to maintain or reestablish illegitimate control over the political processes or institutions or the economic resources or enterprises of the Federal Republic of Yugoslavia, the Republic of Serbia, the Republic of Montenegro, or the territory of Kosovo;

(C) to have provided material support or resources to any person designated in or pursuant to section 1(a) of this order; or

(D) to be owned or controlled by or acting or purporting to act directly or indirectly for or on behalf of any person designated in or pursuant to section 1(a) of this order.

(b) All property and interests in property blocked pursuant to this order prior to 12:01 a.m., eastern standard time, on January 19, 2001, shall remain blocked except as otherwise authorized by the Secretary of the Treasury.”

(b) Section 2 of Executive Order 13088, as replaced by section 1(b) of Executive Order 13121, is revoked and a new section 2 is added to read as follows:

“Sec. 2. Further, except to the extent provided in section 203(b) of IEEPA (50 U.S.C. 1702(b)), and in regulations, orders, directives, or licenses that may hereafter be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, I hereby prohibit any transaction or dealing by a United States person or within the United States in property or interests in property of any person designated in or pursuant to section 1(a) of this order.”

\* \* \* \*

## **2. Blocking Property of Persons Who Threaten International Stabilization Efforts in the Western Balkans**

On June 26, 2001, President George W. Bush, issued Executive Order 13219 blocking property of persons who threaten international stabilization efforts in the Western Balkans. 66 Fed. Reg. 34777 (June 29, 2001). The excerpts below from the Executive Order describe the basis for that action and its effect.

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By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.) (IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), and section 301 of title 3, United States Code,

\* \* \* \*

I, GEORGE W. BUSH, President of the United States of America, have determined that the actions of persons engaged in, or assisting, sponsoring, or supporting, (i) extremist violence in the former Yugoslav Republic of Macedonia, southern Serbia, the Federal Republic of Yugoslavia, and elsewhere in the Western Balkans region, or (ii) acts obstructing implementation of the Dayton Accords in Bosnia or United Nations Security Council Resolution 1244 of June 10, 1999, in Kosovo, threaten the peace in or diminish the security and stability of those areas and the wider region, undermine the authority, efforts, and objectives of the United Nations, the North Atlantic Treaty Organization

(NATO), and other international organizations and entities present in those areas and the wider region, and endanger the safety of persons participating in or providing support to the activities of those organizations and entities, including United States military forces and Government officials. I find that such actions constitute an unusual and extraordinary threat to the national security and foreign policy of the United States, and hereby declare a national emergency to deal with that threat. I hereby order:

Section 1. (a) Except to the extent provided in section 203(b)(1), (3), and (4) of IEEPA (50 U.S.C. 1702(b)(1), (3), and (4)), the Trade Sanctions Reform and Export Enhancement Act of 2000 (title IX, Public Law 106-387), and in regulations, orders, directives, or licenses that may hereafter be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date, all property and interests in property of:

(i) the persons listed in the Annex to this order; and

(ii) persons designated by the Secretary of the Treasury, in consultation with the Secretary of State, because they are found:

(A) to have committed, or to pose a significant risk of committing, acts of violence that have the purpose or effect of threatening the peace in or diminishing the stability or security of any area or state in the Western Balkans region, undermining the authority, efforts, or objectives of international organizations or entities present in the region, or endangering the safety of persons participating in or providing support to the activities of those international organizations or entities, or,

(B) to have actively obstructed, or to pose a significant risk of actively obstructing, implementation of the Dayton Accords in Bosnia or United Nations Security Council Resolution 1244 in Kosovo, or

(C) materially to assist in, sponsor, or provide financial or technological support for, or goods or services in support of, such acts of violence or obstructionism, or

(D) to be owned or controlled by, or acting or purporting to act directly or indirectly for or on behalf of, any of the foregoing persons, that are or hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons, are blocked and may not be transferred, paid, exported, withdrawn, or otherwise dealt in.

(b) I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by United States persons to persons designated in or pursuant to paragraph (a) of this section would seriously impair my ability to deal with the national emergency declared in this order. Accordingly, the blocking of property and interests in property pursuant to paragraph (a) of this section includes, but is not limited to, the prohibition of the making by a United States person of any such donation to any such designated person, except as otherwise authorized by the Secretary of the Treasury.

(c) The blocking of property and interests in property pursuant to paragraph (a) of this section includes, but is not limited to, the prohibition of the making or receiving by a United States person of any contribution or provision of funds, goods, or services to or for the benefit of a person designated in or pursuant to paragraph (a) of this section.

\* \* \* \*

## **D. LIFTING OF SANCTIONS ON INDIA AND PAKISTAN**

### **1. Presidential Determination**

On September 22, 2001, President Bush issued Presidential Determination No. 2001-28, waiving nuclear-related sanctions previously imposed on India and Pakistan. 66 Fed. Reg. 50095 (Oct. 2, 2001). The Determination, set forth in a Memorandum for the Secretary of State, provides as follows:

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Pursuant to § 9001(b) of the Department of Defense Appropriations Act, 2000 (Public Law 106-79), I hereby determine and certify to the Congress that the application to India and Pakistan of the sanctions and prohibitions contained in subparagraphs (B), (C), and (G) of § 102(b)(2) of the Arms Export Control Act would not be in the national security interests of the United States. Furthermore, pursuant to § 9001(a) of the Department of Defense Appropriations Act, 2000 (106-79), I hereby waive, with respect to India and Pakistan, to the extent not already waived,



the application of any sanction contained in § 101 or 102 of the Arms Export control Act, § 2(b)(4) of the Export Import Bank Act of 1945, and § 620E(e) of the Foreign Assistance Act of 1961, as amended.

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Section 102 of the Arms Export Control Act, popularly referred to as the “Glenn Amendment,” provides for the imposition of sanctions against countries on the basis of certain nuclear-related actions. 22 U.S.C. § 2799aa-1. Section 102(b) requires the imposition of sanctions for, among other things, the detonation of a nuclear explosive device by a non-nuclear-weapon state.<sup>1</sup> On May 13, 1998, the President had determined “that India, a non-nuclear-weapon state, detonated a nuclear explosive device on May 11, 1998. The relevant agencies and instrumentalities of the United States Government are hereby directed to take the necessary actions to impose the sanctions described in § 102(b)(2). . . .” Presidential Determination 98-22, 63 Fed.Reg. 27665 (May 20, 1998). On May 30, 1998, the President had made a similar determination for Pakistan, based on detonation of a nuclear explosive device on May 28, 1998. Presidential Determination 98-25, 63 Fed. Reg. 31881 (June 10, 1998). The waiver authority of § 9001 of the Department of Defense Appropriations Act, 22 U.S.C. § 2799aa-1 note, on which the President relied, applies specifically to certain sanctions imposed against India and Pakistan under the Arms Export Control Act (the Glenn amendment, noted above, and the Symington Amendment, 22 U.S.C. § 2799aa), the Export Import Bank Act of 1945 (§ 2(b)(4), 12 U.S.C. § 635(b)(4)), and the Foreign Assistance Act of 1961, as amended (the Pressler Amendment, § 620E(e), 22 U.S.C. § 2375(e)).

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<sup>1</sup> The term “non-nuclear-weapon state” is defined in the statute to mean “any country which is not a nuclear-weapon state, as defined in Article IX(3) of the Treaty on the Non-Proliferation of Nuclear Weapons.” Article IX(3) defines “nuclear-weapon state” to mean a state that ‘has manufactured and exploded a nuclear weapon’ prior to January 1, 1967—i.e., the U.S., Russia, China, the U.K. and France.

A Fact Sheet provided by the Department of State on September 28, 2001, enumerated the sanctions affected by the Presidential Determination, as set forth below.

The full text of the Fact Sheet is available at [www.pmdtc.org/IndiaPakistan.htm](http://www.pmdtc.org/IndiaPakistan.htm).

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## India and Pakistan

### *Glenn Amendment*—ALL WAIVED

- Prohibit assistance under Foreign Assistance Act, U. S. Government credit, credit guarantees and “other financial assistance” by departments, agencies, or instrumentalities of U.S.
- Direct U.S. to “oppose” non-basic human needs loans, financial or technical assistance through International Financial Institutions.
- Bar export licenses for U.S. Munitions List items and certain dual-use items. (Individual waiver previously granted for helicopter parts to India.)
- Prohibit government defense sales under Foreign Military Sales and Foreign Military Financing. (Individual waiver previously granted for equipment for Pakistan’s forces serving in United Nations Mission in Sierra Leone UNAMSIL).

## Pakistan only

*Export-Import Bank Act* prohibits Export-Import Bank guarantees, insurance and credits to any non-nuclear weapons state that detonates a nuclear device. *WAIVED*. (Previously waived for India).

*Pressler Amendment* prohibits military assistance and transfers of military equipment or technology unless President certifies Pakistan does not possess a nuclear explosive device. *WAIVED*.

*Symington Amendment* blocks use of Foreign Assistance Act or Arms Export Control Act funds for economic assistance, military assistance or International Military Education and Training, assistance for Peacekeeping Operations, or military credits or guarantees to any country which receives from any other country nuclear enrichment equipment without safeguards. *WAIVED*.

\* \* \* \*

## Entity List for Pakistan and India

*The Commerce Department's "Entity List" is published in the U.S. Export Administration Regulations (Supplement 4 to Section 744, see [www.bxa.doc.gov/Entities/](http://www.bxa.doc.gov/Entities/)). It was developed to help U.S. exporters identify foreign end-users that require individual export licenses for certain sensitive U.S. commodities and technologies of proliferation concern. A number of Indian and Pakistani entities are on this list. Their status was not affected by the recent waivers. The list continues to be reviewed.*

### 2. Implementation of Change in Export/Reexport Policy

On October 1, the Department of Commerce, Bureau of Export Administration, published a final rule in the Federal Register to remove "the policy of denial for exports and reexports of items controlled for Nuclear Proliferation (NP) and Missile Technology (MT) reasons to India and Pakistan" and taking other steps related to the Entity List, described in 1 *supra*. 66 Fed.Reg.50090 (Oct. 1, 2001).

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Excerpts below from the Federal Register notice explain the background and effect of the new rule as follows:

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In accordance with section 102(b) of the Arms Export Control Act, President Clinton reported to the Congress on May 13, 1998, with regard to India, and on May 30, 1998, with regard to Pakistan, his determinations that those states had each detonated a nuclear explosive device. The President directed that the relevant agencies and instrumentalities of the United States take the necessary actions to implement the sanctions described in section 102(b)(2) of that Act. In light of the President's directive, the Bureau of Export Administration (BXA) adopted certain regulations to implement the sanctions, as well as certain supplementary measures to enhance the sanctions on November 19, 1998 (63 FR 64322).

On September 22, 2001, in Presidential Determination No. 2001-28, and pursuant to section 9001(b) of the Department of Defense Appropriations Act, 2000 (Public Law 106-79), President George W. Bush determined and certified to the Congress that the application to India and Pakistan of the sanctions and prohibitions contained in subparagraphs (B), (C), and (G) of section 102(b)(2) of the Arms Export Control Act would not be in the national security interest of the United States. Furthermore, pursuant to section 9001(a) of the Department of Defense Appropriations Act, 2000 (Public Law 106-79), the President waived, with respect to India and Pakistan, to the extent not already waived, the application of any sanction contained in sections 101 or 102 of the Arms Export Control Act.

Based on this Presidential Determination, this rule implements the lifting of these sanctions by removing section 742.16 of the Export Administration Regulations (EAR), which sets forth the policy of denial for exports and reexports of items controlled for Nuclear Proliferation (NP) and Missile Technology (MT) reasons to India and Pakistan. A license will continue to be required to India and Pakistan for these items, but the license review policy will revert to a case-by-case review, as set forth in sections 742.3 and 742.5 of the EAR for nuclear- and missile-controlled items, respectively. Also, exports of these items to India and Pakistan, other than exports to entities listed on the Entity List, are again eligible for the use of License Exceptions as provided in Part 740 of the EAR.

In light of the President's determination, this rule also removes the supplementary measures, implemented in 1998, by removing sections 744.11, "Restrictions on certain government, parastatal, and private entities in Pakistan and India," and 744.12, "Restrictions on certain military entities in Pakistan and India," from the EAR. This rule also revises the list of Indian and Pakistani entities on the Entity List pursuant to section 744.1(c) of the EAR. License requirements for Indian and Pakistani entities on the Entity List are contained in Supplement No. 4 to Part 744 of the EAR. The license review policy for export and reexports to all Indian and Pakistani listed entities of items classified as EAR99 (items that are subject to the EAR, but are not listed on the Commerce

Control List) is presumption of approval, and the license review policy for items listed on the Commerce Control List is case-by-case.

The removal of entities from the Entity List eliminates the existing license requirements in Supplement No. 4 to Part 744 for exports to those entities. The removal of entities from the Entity List does not relieve exporters or reexporters of their obligations under part 744 of the EAR, which provides that a license is required even when one would not otherwise be necessary, if an exporter knows, has reason to know, or is otherwise informed by BXA that the item will be used in activities related to nuclear, chemical, or biological weapons, or missile delivery systems. BXA strongly urges the use of Supplement No. 3 to part 732 of the EAR, “BXA’s ‘Know Your Customer’ Guidance and Red Flags” when exporting or reexporting to India and Pakistan.

### **3. Other Sanctions against Pakistan**

#### ***a. Sanctions related to military coup and loan default***

On October 27, President Bush signed into law legislation that exempted Pakistan from certain assistance restrictions for FY 2002 and provided the President with authority to waive them through FY 2003. The sanctions had been imposed as a result of Pakistan’s military coup and its default on certain loans. Pub. L. No. 107-57, 115 Stat. 403 (Oct. 27, 2001).

#### ***b. Missile proliferation sanctions***

On November 2, 2001, missile proliferation sanctions against the Pakistan Ministry of Defense were lifted for two types of transactions: those supporting Operation Enduring Freedom and those comparable to transactions interrupted by the imposition of sanctions under § 102 of the Arms Export Control Act after the detonation of a nuclear explosive device in May 1998. 66 Fed. Reg. 56892 (Nov. 13, 2001). They remain in place for transactions other than those described above. The sanctions had been imposed on November 21, 2000

based on a finding that certain named foreign persons had “engaged in missile technology proliferation activities” that required the imposition of various sanctions described in the missile sanctions law (§ 73(a)(2) of the Arms Export Control Act, 22 U.S.C. § 2797b(a)(2)) and § 11B(b)(1)(B) of the Export Administration Act of 1979, 50 U.S.C. app. § 2410b(b)(1)(B)). 65 Fed. Reg. 71348 (Nov. 30, 2000). Excerpts below from the Federal Register notice of November 2001 describes the action taken.

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... Pursuant to section 73(e) of the Arms Export Control Act (22 U.S.C. 2797b(e)), section 11B(b)(5) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(5))(as carried out under Executive Order 13222 of August 17, 2001 (66 FR 44025)), and section 2 of Public Law 107-57, a determination was made on November 2, 2001, that it is essential to the national security of the United States to waive missile proliferation sanctions imposed on November 21, 2000, on the Pakistani Ministry of Defense (“MOD”), its sub-units and successors, as follows: The prohibition on exports of items and technology and U.S. Government contracts as described in section 73(a)(2)(B) of the Arms Export Control Act (22 U.S.C. 2797b(a)(2)(B)) and the prohibition on new individual export licenses as described in section 11B(b)(1)(B)(ii) of the Export Administration Act of 1979 (50 U.S.C. app. 2410b(b)(1)(B)(ii)) were waived for transactions determined to be needed (1) To support Operation Enduring Freedom and (2) to permit sale or export to Pakistan of defense articles or defense services comparable to those delivery of which was blocked by the imposition of sanctions on May 30, 1998.

The following missile proliferation sanctions will remain in place:

(1) Sanctions against the Pakistani entities Space and Upper Atmosphere Research Commission (SUPARCO) and National Development Complex (NDC);

(2) import sanctions against the Pakistani MOD pursuant to section 73(a)(2)(C) of the Arms Export Control Act and section 11B(b)(1)(B)(iii) of the Export Administration Act;

(3) prohibition on new State or Commerce export licenses to and new USG contracts with the Pakistani MOD in the absence

of a determination that the transaction is within the scope of the waiver described above.

## E. IRAQ

During 2001, the UN Security Council considered changes proposed by the United States and United Kingdom to the structure of the UN's Oil for Food Program for Iraq. The centerpiece of these changes is a proposed Goods Review List, which specifies particular goods that may not be exported to Iraq without the approval of the UN's Iraq Sanctions Committee. This system would replace the current system, under which most goods require the approval of the Iraq Sanctions Committee before they may be exported to Iraq. In Resolution 1382, adopted November 29, 2001, the Council decided to adopt the proposed Goods Review List and procedures for its implementation, subject to any refinements to them agreed by the Council in light of further consultation, for implementation beginning on May 30, 2002. Consultations on such refinements were underway at the end of 2001. Excerpts below from a Statement in the Security Council by Ambassador James B. Cunningham, Acting U.S. Permanent Representative to the United Nations, on June 26, 2001, explained the U.S. support of the Goods Review List approach.

The full text of Ambassador Cunningham's Statement is available at [www.un.int/usa/o1\\_095.htm](http://www.un.int/usa/o1_095.htm) and the texts of the Security Council Resolutions are available at [www.un.org/Docs/scres/2001/sc2001.htm](http://www.un.org/Docs/scres/2001/sc2001.htm).

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On August 2, 1990, and for the six months it took the UN to remove invading Iraqi troops, the Iraqi regime attempted the unthinkable: to extinguish the existence of another UN member state. Once the international community defeated that attempt, the Security Council focused on ensuring that the regime which carried out the invasion, and which remains unrepentant to this

day, would not have the ability to wage war on its neighbors, or to threaten them with weapons of mass destruction ever again. To this point, we have been successful. The Security Council has assumed a special role in maintaining security in the Gulf region. Iraq continues to pose a clear threat to that security and it must be the Council's purpose to ensure that that threat remains contained. But it is clear that the Iraqi people have borne the burden of the regime's policies. The Oil-For-Food program has grown into the largest humanitarian program ever run by the international community. It is a reflection of the regime's lack of cooperation and disregard for its own population, that despite the billions of dollars that have gone into Iraq under the program, Iraq's development levels have not met the potential of the Oil-For-Food process. It is equally a measure of the program's success that Iraq's development, by some standards, actually exceeds that of some of its regional neighbors. During these past six years, the nature of Oil-For-Food has changed, even though the name has not. A better name today would be Oil-For-Development, because such a term would more accurately reflect that even today the Iraqi regime could re-develop the country using the Oil-For-Food program, if it chose to do so.

Instead, Iraq is using money and oil as a weapon against the international community. Iraq has not sold oil since the passage of Resolution 1352. This has cost the humanitarian program more than half a billion dollars, on top of the several billion dollars that Iraq lost by shutting off oil some months ago. Iraq has made much of the fact that its financial liquidity will allow it to defy the international community for several months. It has been clear for some time that we, the international community, care more for the Iraqi people than the regime does. As a result, Baghdad is making clear that, despite all its protests, it actually prefers the status quo to our proposal to change the Oil-For-Food program to allow the Iraqi people the broadest possible contact with the rest of the world, especially through civilian commercial trade and to significantly improve the humanitarian situation in Iraq. My government is accustomed by now to Iraq's cynicism towards its own people, and to its bluster and threatening policies. We find it harder to understand, however, why others would join in playing that game when the status quo is clearly not satisfactory.



\* \* \* \*

Under the current system—to which we will revert if the new system cannot be brought into being—all exports to Iraq are forbidden, unless specifically permitted by Security Council resolution or a specific decision of the Sanctions Committee. Under the proposed system, everything is permitted unless it is contained on a list of military or dual use goods—in which case it will be reviewed, not denied. Iraq will be able to acquire everything it needs to improve the lives of its people, and to provide for the country's development. The Iraqi regime will be prevented only from acquiring the few items critical to increasing its ability to threaten international peace and security. Almost every item that Iraq could need or want for its civilian development will not be subject to review by the Sanctions Committee. Goods could flow rapidly to where they are needed most under a simplified procedure. Even items subject to control would go to Iraq once there is confidence that they would not be used to rebuild Iraq's weapons of mass destruction or improve its military capabilities.

Some continue to confuse the proposed review list with a denial list. Let me address this once again because it is at the heart of the proposal: the items on the Goods Review List will be subject to careful review by the Sanctions Committee. If it is clear the goods will only be used for civilian purposes, those goods will be approved for export. This is a historically significant change in the way the UN does business with Iraq, and it is directly responsive to concerns raised in this Chamber repeatedly in the past. And, contrary to assertions about “vague procedures,” we are in fact negotiating agreed procedures that will provide the desired clarity—at least to almost all of the members of the Security Council.

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## **F. IRAN AND LIBYA SANCTIONS ACT**

On August 3, 2001, the President signed into law a 5-year extension of the Iran and Libya Sanctions Act (“ILSA”), 50 U.S.C. § 1701 note, with amendments. As amended, ILSA provides for the imposition of sanctions against persons who make certain investments of \$20 million or more that

directly and significantly contribute to the enhancement of Iran's or Libya's ability to develop their petroleum resources. The two amendments contained in the Act reduce from \$40 million to \$20 million the threshold at which investments in Libya may trigger ILSA sanctions, and revise ILSA's definition of "investment" as it applies to amendments or modifications of existing agreements or contracts. Excerpts below from the President's signing statement provide the United States views on this issue.

The full text of the Statement is available at [www.white-house.gov/news/releases/2001/08/20010803-11.html](http://www.white-house.gov/news/releases/2001/08/20010803-11.html).

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I believe that we should review sanctions frequently to assess their effectiveness and continued suitability. A new provision in this bill mandates a report on the impact of certain actions taken pursuant to the Act. I approve of this statutorily mandated requirement to periodically assess the effectiveness of sanctions and to recommend whether the Congress should terminate or modify the Act. The Act also continues the President's power to waive sanctions in the national interest.

My Administration shares the Congress' deep concerns about the objectionable policies and behavior of Iran and Libya. We are addressing these concerns in a number of ways. In particular, we are strengthening our efforts with other countries, whose cooperation is essential to pursuing the most effective approaches to solving the problems of proliferation and terrorism addressed by ILSA.

Libya must address its obligations under U.N. Security Council Resolutions. These relate to the 1988 Lockerbie bombing and require Libya to accept responsibility for the actions of Libyan officials, disclose all it knows about the bombing, renounce terrorism, and pay appropriate compensation. Cooperative action by Libya on these four issues would make it possible for us to begin to move toward a more constructive relationship.

With respect to Iran, we continue to have serious concerns over its support for terrorism, opposition to the Middle East peace process, and pursuit of weapons of mass destruction. I hope that

the Iranian people's recently expressed desire for a freer, more open, and more prosperous society will give our two countries an opportunity to identify areas where our interests converge, and where we can work together constructively for our mutual benefit.

\* \* \* \*

## **G. TRADE SANCTIONS REFORM AND EXPORT ENHANCEMENT ACT OF 2000**

The Trade Sanctions Reform and Export Enhancement Act ("TSRA"), Title IX of Pub. L. No. 106-387, 114 Stat. 1549, 1549A-67 (2000), 22 U.S.C. § 7205 et seq., among other things, effectively eliminates most unilateral U.S. sanctions on agricultural commodities, medicines and medical devices, except in limited circumstances. (*See also Digest* 2000, Chapter 15.4). At the same time, TSRA § 906 imposes licensing restrictions on exports of most agricultural commodities to Cuba and agricultural commodities, medicines and medical devices to the government of any country designated as a state sponsor of terrorism under § 620A of the Foreign Assistance Act of 1961, as amended (22 U.S.C. § 2371), § 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. app. § 2405(j)(1)), or § 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)), or to any other entity in such a country. An exception is provided for such exports to the governments of Syria and North Korea.

### **1. Regulations to Implement TSRA**

#### ***a. Office of Foreign Assets Control***

On July 12, 2001, the Office of Foreign Assets Control, Department of the Treasury, issued an interim rule with request for comments to implement the TSRA by amending the Cuban Assets Control Regulations, the Sudanese Sanctions Regulations, the Libyan Sanctions Regulations, and the Iranian Transactions Regulations. 66 Fed.Reg. 36683-01 (July 12, 2001). Background information provided in the Federal Register notice describes the effect of the rule as follows:

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\*   \*   \*   \*

The Trade Sanctions Reform and Export Enhancement Act of 2000, Title IX of Public Law 106-387 (October 28, 2000) (the “TSRA”), provides that the President shall terminate any unilateral agricultural sanction or unilateral medical sanction in effect as of the date of enactment of the TSRA. The TSRA does not direct the termination of any unilateral agricultural sanction or unilateral medical sanction that prohibits, restricts, or conditions the provision or use of any agricultural commodity, medicine, or medical device that is controlled on the United States Munitions List, controlled on any control list established by the Export Administration Act of 1979 or any successor statute, or used to facilitate the development or production of chemical or biological weapons or weapons of mass destruction. Exporters should consult the Department of Commerce, Bureau of Export Administration (“BXA”), to determine whether a particular item is controlled under specific Export Commodity Control Number (“ECCN”) on the Commerce Control List in the Export Administration Regulations, 15 CFR part 774, supplement no. 1 (the “CCL”). Section 906 of the TSRA further requires that the export of agricultural commodities, medicine, or medical devices to Cuba or to the government of a country that has been determined by the Secretary of State, under Section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 6(j)(1) of the Export Administration Act of 1979 (50 U.S.C. app. 2405(j)(1)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)), to have provided support repeatedly for acts of international terrorism, or to any other entity in such a country, shall only be made pursuant to one-year licenses issued by the United States Government. The governments of Cuba, Sudan, Libya, and Iran have been designated as supporting international terrorism pursuant to section 6(j) of the Export Administration Act of 1979. These regulations amend the Cuban Assets Control Regulations, 31 CFR part 515 (“CACR”), the Sudanese Sanctions Regulations, 31 CFR part 538 (the “SSR”), the Libyan Sanctions Regulations, 31 CFR part 550 (the “LSR”), and the Iranian Transactions Regulations, 31 CFR part 560 (the “ITR”), to implement the TSRA as required. The Department of Treasury’s Office of Foreign

Assets Control (“OFAC”) has endeavored to implement the TSRA in a way that is consistent with both the statutory language and the intent of its drafters and in a manner that also provides exporters with an efficient and expedited process for engaging in authorized exports of agricultural commodities, medicine, and medical devices. Following this approach, OFAC is applying the licensing procedures required by section 906 of the TSRA to all exports and reexports of agricultural commodities, medicine, and medical devices to Sudan, Libya, and Iran that are within the current scope of OFAC’s licensing jurisdiction. Similarly, OFAC is applying this licensing procedure to cover exports to the governments of Sudan, Libya, and Iran, any entities in these countries, and individuals in these countries, as well as to persons in third countries purchasing specifically for resale to any of the foregoing.

\* \* \* \*

***b. Bureau of Export Administration***

Also on July 12, 2001, the Bureau of Export Administration, Department of Commerce, issued an interim final rule with request for comments amending the Export Administration Regulations (“EAR”) to implement the TSRA by creating “a new License Exception AGR for exports of agricultural commodities classified as EAR99 from the United States to Cuba and reexports of U.S. origin agricultural commodities classified as EAR99 to Cuba.” 66 Fed. Reg. 36676 (July 12, 2001). The rule also provides procedures to be followed in coordinating on exports with OFAC, as noted in the excerpt above.

**2. Amendments to TSRA in the USA PATRIOT Act**

Section 221 of the USA PATRIOT Act of 2001, Pub. L. 107-56, 115 Stat. 272, amended TSRA by, among other things, providing that the limitations on sanctions established by TSRA would not apply in certain circumstances. Specifically, it provides that nothing in TSRA limits the application or scope of “any law establishing criminal or civil penalties, including any Executive order or regulation promulgated pur-

suant to such laws . . . for the unlawful export of any agricultural commodity, medicine, or medical device” to the following entities: terrorist entities designated under Executive Order No. 12947 (January 23, 1995) and 13224 (September 23, 2001) and Foreign Terrorist Organizations under the Antiterrorism and Effective Death Penalty Act of 1996; narcotics trafficking entities designated pursuant to Executive Order No. 12978 (October 21, 1995) or the Foreign Narcotics Kingpin Designation Act (Public Law 106-120); or “any foreign organization, group or persons subject to any restriction for its involvement in weapons of mass destruction or missile proliferation.” 22 U.S.C. § 7210. It also expanded an existing exception to allow sanctions to the extent they would affect an agricultural commodity, medicine or medical device that is “used to facilitate the design, development or production of chemical or biological weapons, missiles, or weapons of mass destruction.” 22 U.S.C. § 7203(2)(C)

Section 221 also added “the Taliban or the territory of Afghanistan controlled by the Taliban” as a destination for which licensing restrictions are imposed on the export of agricultural commodities, medicine or medical devices under 22 U.S.C. § 7205(a)(1). A further amendment clarified that an exception to the licensing restrictions imposed on state sponsors of terrorism, 22 U.S.C. § 7205(a)(2), applies not only to the Governments of Syria and North Korea, but also to any other entity in those countries as well.

## **Cross References**

*Sanctions policy toward North Korea, Chapter 18.C.6.*

*Sanctions impositions related to the terrorist attacks of September 11, 2001, Chapter 19.C.1. and 2.*

*Amendments to IEEPA, Chapter 19.C.4.C.*

## CHAPTER 17

# International Conflict Resolution and Avoidance

### A. ISRAELI-PALESTINIAN CONFLICT

At an Israeli-Palestinian summit held in Sharm el-Sheikh, Egypt in October 2000, the Israeli and Palestinian sides agreed to the formation of a fact-finding committee to study the events involving violence in Jerusalem, the Gaza Strip, and the West Bank in the several weeks prior to the summit, and ways to prevent their recurrence. The five-member committee, chaired by former U.S. Senator George Mitchell, issued its Report of the Sharm el-Sheikh Fact-Finding Committee on April 30, 2001. The report, among other things, calls upon both sides to reaffirm their commitment to existing agreements and undertakings to halt the violence and to rebuild confidence and resume negotiations. In a letter to Senator Mitchell of May 21, 2001, Secretary of State Colin Powell, on behalf of President Bush, endorsed the report.

The full text of the Secretary's letter is available at [www.state.gov/s/l](http://www.state.gov/s/l). The Report of the Sharm el-Sheik Fact-Finding Committee is available at [www.usinfo.state.gov/regional/nea/mitchell.htm](http://www.usinfo.state.gov/regional/nea/mitchell.htm).

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On behalf of President Bush, I commend you and the entire Sharm el-Sheik Fact-Finding Committee for the excellent report you produced. The Committee has provided the parties with ideas that, with the support of the international community, can help to find a solution to this terrible tragedy that has trapped the

Israeli and Palestinian peoples in a continuing downward spiral of violence for the past eight months, a spiral that has seen yet more tragic consequences in the last few days. We believe both sides should give serious consideration to the Committee's recommendations and it is in this spirit that we endorse the report.

The United States calls on both sides to immediately address the Committee's primary recommendations to end the violence by reaffirming their commitment to existing agreements and undertakings, implementing an unconditional cessation of violence, and resuming security cooperation. In this connection, we note the report's reference to the need for the Palestinians to "make an all-out effort to enforce a complete cessation of violence."

Confidence between the two sides has been badly eroded over the past months, and they both bear a responsibility to rebuild that confidence if a cessation of violence is to be sustained. The parties should give prompt consideration to adopting the confidence building measures recommended by the Committee in order to create conditions that will permit a rapid transition to the resumption of negotiations. Both sides must avoid unilateral acts that prejudice the outcome of permanent-status negotiations and that could be perceived by the other side as provocative. In this connection, we note the report's observations on the negative impact of continued settlement activity on the prospects for peace. We believe that this issue is an essential confidence building measure that needs to be addressed by the parties.

Carrying out these and other measures proposed by the Committee to restore trust and confidence will not be easy. As the report notes, "Israeli leaders do not wish to be perceived as 'rewarding violence.' Palestinian leaders do not wish to be perceived as 'rewarding occupation.'" We call on Prime Minister Sharon and Chairman Arafat to exercise the leadership needed to resume direct negotiations in order to resolve all of the differences between the two sides. Negotiation provides the only path to a just, lasting, and comprehensive peace in the Middle East.

The United States agrees with the Committee's assessment that "(i)t is for the parties themselves to undertake the main burden of day-to-day cooperation, but they should remain open to engaging the assistance of others in facilitating that work. Such outside assistance should be by mutual consent. . . ." The United States



is prepared to work with the international community to support the parties in their efforts to create an environment for peace, but it cannot impose solutions on them. The decisions are theirs to make.

The Committee's task of assessing the causes and solutions for the recent heart-wrenching violence between Israelis and Palestinians was an extremely difficult one. The Committee performed that task with professionalism, independence, and leadership. I now ask that the Committee proceed with the publication of its final report. With the publication of the final report, the Committee will have fulfilled its mandate, and thereby brought an end to its work. It is now the task of both parties to give serious consideration to the recommendations contained in the report. Through its work, the Committee has made an important contribution to the parties in their efforts to find a pathway to peace. On behalf of President Bush and the United States, I thank the entire Committee and the Committee's staffs for their extraordinary efforts in the cause of peace.

## **B. MACEDONIA**

In February, 2001, armed ethnic-Albanian extremists launched a violent insurgency in areas in northern Macedonia adjacent to Kosovo. A group of Kosovar and Macedonian ethnic Albanians, calling themselves the "National Liberation Army" (NLA), seized territory and launched attacks against government forces while demanding greater civil rights for ethnic Albanians. The insurgency spread through northern and western Macedonia. In June the insurgents occupied Aracinovo, a village five kilometers from the capital, Skopje.

After a government offensive failed to remove them, and at the Government's request, the North Atlantic Treaty Organization (NATO) negotiated the insurgents' withdrawal and escorted them out of the Aracinovo area.

Over the ensuing months, international mediators sought to facilitate the negotiation of arrangements to end the crisis. On July 5, the government and the insurgents negotiated a cease-fire. On August 13, 2001, a Framework Agreement with three Annexes concerning the future of Macedonia was signed in Skopje and entered into force. The agreement

was signed by the President of the Republic of Macedonia; representatives of four Macedonian political parties, including the VMRO-DPMNE, the Democratic Party of Albanians, the Social Democratic Union of Macedonia, and the Party for Democratic Prosperity; and witnessed by representatives of the European Union and the United States of America. The agreement generally calls for the passage of constitutional amendments and legislation designed to provide enhanced protections to the Albanian minority and to reform certain political institutions. The Macedonian parliament ratified the agreement and amended the country's constitution on November 16.

The basic principles of the Framework Agreement are set forth below. The full text is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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## FRAMEWORK AGREEMENT

The following points comprise an agreed framework for securing the future of Macedonia's democracy and permitting the development of closer and more integrated relations between the Republic of Macedonia and the Euro-Atlantic community. This Framework will promote the peaceful and harmonious development of civil society while respecting the ethnic identity and the interests of all Macedonia citizens.

### 1. Basic Principles

1.1 The use of violence in pursuit of political aims is rejected completely and unconditionally. Only peaceful political solutions can assure a stable and democratic future for Macedonia.

1.2 Macedonia's sovereignty and territorial integrity, and the unitary character of the State are inviolable and must be preserved. There are no territorial solutions to ethnic issues.

1.3 The multi-ethnic character of Macedonia's society must be preserved and reflected in public life.

1.4 A modern democratic state in its natural course of development and maturation must continually ensure that its Constitution fully meets the needs of all its citizens and comports

with the highest international standards, which themselves continue to evolve.

1.5 The development of local self-government is essential for encouraging the participation of citizens in democratic life, and for promoting respect for the identity of communities.

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## CHAPTER 18

# Use of Force and Arms Control

### A. USE OF FORCE

#### Exercise of Self Defense by United States

This topic is covered in Chapter 19, which addresses the response of the United States to the attacks of September 11, 2001.

### B. ARMS CONTROL

#### 1. Anti-Ballistic Missile Treaty

##### *a. Efforts to renegotiate ABM treaty*

The United States and Russia discussed the development of a new strategic framework and the possibility of renegotiating the terms of the ABM Treaty on several occasions in 2001. *See, e.g.*, a press conference of November 13, 2001, held by Presidents Bush and Putin, in which they note that the two sides have different points of view but will continued to negotiate.

The full text of the Press Conference is available at [www.whitehouse.gov/news/releases/2001/11/20011113-3.html](http://www.whitehouse.gov/news/releases/2001/11/20011113-3.html).

**b. United States withdrawal from ABM Treaty***(1) Diplomatic note*

Despite further efforts, the United States and Russia were unable to move forward on negotiation of the ABM Treaty amendments necessary to permit the testing and developmental work required to protect U.S. national security interests. On December 13, 2001, President George W. Bush formally notified Russia, Belarus, Kazakhstan and Ukraine, under the terms of Article XV of the Treaty, of the United States' intent to withdraw from the Treaty. The effective date of withdrawal is June 13, 2002, six months after the notification date, as provided in Article XV. The diplomatic note sent to the four countries is set forth below.

The full text of the note is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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Article XV, paragraph 2, gives each Party the right to withdraw from the Treaty if it decides that extraordinary events related to the subject matter of the treaty have jeopardized its supreme interests.

The United States recognizes that the Treaty was entered into with the USSR, which ceased to exist in 1991. Since then, we have entered into a new strategic relationship with Russia that is cooperative rather than adversarial, and are building strong relationships with most states of the former USSR.

Since the Treaty entered into force in 1972, a number of state and non-state entities have acquired or are actively seeking to acquire weapons of mass destruction. It is clear, and has recently been demonstrated, that some of these entities are prepared to employ these weapons against the United States. Moreover, a number of states are developing ballistic missiles, including long-range ballistic missiles, as a means of delivering weapons of mass destruction. These events pose a direct threat to the territory and security of the United States and jeopardize its supreme interests. As a result, the United States has concluded that it must develop, test, and deploy anti-ballistic missile systems for the defense of

its national territory, of its forces outside the United States, and of its friends and allies.

Pursuant to Article XV, paragraph 2, the United States has decided that extraordinary events related to the subject matter of the Treaty have jeopardized its supreme interests. Therefore, in the exercise of the right to withdraw from the Treaty provided in Article XV, paragraph 2, the United States hereby gives notice of its withdrawal from the Treaty. In accordance with the terms of the Treaty, withdrawal will be effective six months from the date of this notice.

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*(2) White House statement*

An ABM Fact Sheet released by the White House Press Secretary on December 13, 2001 elaborated on the decision to withdraw and the growing cooperative relationship with Russia.

The Fact Sheet is available at [www.whitehouse.gov/news/releases/2001/12/20011213-2.html](http://www.whitehouse.gov/news/releases/2001/12/20011213-2.html).

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The circumstances affecting U.S. national security have changed fundamentally since the signing of the ABM Treaty in 1972. The attacks against the U.S. homeland on September 11 vividly demonstrate that the threats we face today are far different from those of the Cold War. During that era, now fortunately in the past, the United States and the Soviet Union were locked in an implacably hostile relationship. Each side deployed thousands of nuclear weapons pointed at the other. Our ultimate security rested largely on the grim premise that neither side would launch a nuclear attack because doing so would result in a counter-attack ensuring the total destruction of both nations.

Today, our security environment is profoundly different. The Cold War is over. The Soviet Union no longer exists. Russia is not an enemy, but in fact is increasingly allied with us on a growing number of critically important issues. The depth of United States-Russian cooperation in counterterrorism is both a model of the new strategic relationship we seek to establish and a foundation on which to build further cooperation across the broad spectrum

of political, economic and security issues of mutual interest.

Today, the United States and Russia face new threats to their security. Principal among these threats are weapons of mass destruction and their delivery means wielded by terrorists and rogue states. A number of such states are acquiring increasingly longer-range ballistic missiles as instruments of blackmail and coercion against the United States and its friends and allies. The United States must defend its homeland, its forces and its friends and allies against these threats. We must develop and deploy the means to deter and protect against them, including through limited missile defense of our territory.

Under the terms of the ABM Treaty, the United States is prohibited from defending its homeland against ballistic missile attack. We are also prohibited from cooperating in developing missile defenses against long-range threats with our friends and allies. Given the emergence of these new threats to our national security and the imperative of defending against them, the United States is today providing formal notification of its withdrawal from the ABM Treaty. As provided in Article XV of that Treaty, the effective date of withdrawal will be six months from today.

At the same time, the United States looks forward to moving ahead with Russia in developing elements of a new strategic relationship.

- In the inter-related area of offensive nuclear forces, we welcome President Putin's commitment to deep cuts in Russian nuclear forces, and reaffirm our own commitment to reduce U.S. nuclear forces significantly.
- We look forward to continued consultations on how to achieve increased transparency and predictability regarding reductions in offensive nuclear forces.
- We also look forward to continued consultations on transparency, confidence building, and cooperation on missile defenses, such as joint exercises and potential joint development programs.
- The United States also plans to discuss with Russia ways to establish regular defense planning talks to exchange information on strategic force issues, and to deepen cooperation on efforts to prevent and deal with the effects of the spread of weapons of mass destruction and their means of delivery.



The United States intends to expand cooperation in each of these areas and to work intensively with Russia to further develop and formalize the new strategic relationship between the two countries.

The United States believes that moving beyond the ABM Treaty will contribute to international peace and security. We stand ready to continue our active dialogue with allies, China, and other interested states on all issues associated with strategic stability and how we can best cooperate to meet the threats of the 21st century. We believe such a dialogue is in the interest of all states.

## **2. U.S.-Russia Reduction in Nuclear Arsenals**

### ***a. White House fact sheet***

As noted in the Press Statement of December 13, 2001 *supra* concerning U.S. withdrawal from the ABM Treaty, President Bush was also pursuing disarmament initiatives with Russia. On November 14, 2001, the White House issued a Fact Sheet entitled “New Strategic Framework with Russia,” providing the following overview of those discussions.

The full text of the Fact Sheet is available at [www.white-house.gov/news/releases/2001/11/20011114-2.html](http://www.white-house.gov/news/releases/2001/11/20011114-2.html). The Press Conference held by Presidents Bush and Putin on November 13, 2001, *supra* also addressed these issues.

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Nuclear weapons should no longer be at the center of U.S.-Russian relations in a day and age when neither country is the enemy of the other. We believe that the current levels of our nuclear forces do not reflect the strategic realities of today. Therefore, the United States and Russia have confirmed their respective commitments to implement substantial reductions in strategic offensive weapons. President Bush has announced that, for the United States, this will result in a level of 1,700 to 2,200 operationally deployed strategic warheads. President Putin has stated that Russia will try to respond in kind.

Russia and the United States have different views of the ABM

Treaty and strategic defenses. This issue is only one element of our broader relationship. Our differences on this issue will not delay progress in other areas. And we remain committed to continued consultations on a new strategic framework that enables us to meet the new threats of the 21st century together, as true partners and friends, not adversaries.

Finally, the United States and Russia reaffirm their mutual commitment to strengthen efforts to prevent the proliferation of weapons of mass destruction. We agree that urgent attention must continue to be given to improving the physical protection and accounting of nuclear materials of all possessor states, and preventing illicit nuclear trafficking. We also will explore the potential for cooperative efforts in consequence management, drawing on our respective capabilities to respond to biological incidents.

***b. Response of President Putin***

On December 13, 2001, in response to President Bush's notification of the United States' intent to withdraw from the ABM Treaty, President Putin issued a Statement agreeing that the Treaty allowed for withdrawal under exceptional circumstances but expressing his view that the United States was mistaken in deciding to do so. His Statement concluded on the topic of nuclear reduction, as set forth below:

The full text of President Putin's statement is available at [www.state.gov/s/l](http://www.state.gov/s/l).

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. . . [A] particularly important task under these conditions is putting a legal seal on the achieved agreements on further radical, irreversible and verifiable cuts of strategic offensive weapons, in our opinion to the level of 1,500–2,200 nuclear warheads for each side.

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The response of the United States was reported in a Statement by the White House Press Secretary of the same day, as set forth below.

The full text of the Statement as well as remarks by President Bush on national missile defense of the same date are available at [www.whitehouse.gov/news/releases/2001/12/20011213-8.html](http://www.whitehouse.gov/news/releases/2001/12/20011213-8.html)

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We have worked intensively with Russia to create a new strategic framework for our relationship based on mutual interests and cooperation across a broad range of political, economic, and security issues. Together, the United States and Russia have made substantial progress in our efforts and look forward to even greater progress in the future.

The United States in particular welcomes Russia's commitment to deep reductions in its level of offensive strategic nuclear forces. Combined with the reductions of U.S. strategic nuclear forces announced by President Bush in November, this action will result in the lowest level of strategic nuclear weapons deployed by our two countries in decades. We will work with Russia to formalize this arrangement on offensive forces, including appropriate verification and transparency measures.

Russia's announcement of nuclear reductions and its commitment to continue to conduct close consultations with the United States reflect our shared desire to continue the essential work of building a new relationship for a new century.

### **3. Convention on Certain Conventional Weapons**

The United States and other Contracting Parties to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137, 19 I.L.M. 1523, participated in a Review Conference from December 11 through 21, 2001, in Geneva, Switzerland. The purpose of the Conference was to review the scope and operation of the Convention and its annexed Protocols and to consider proposals for amendments to existing instruments and for additional Protocols

relating to other categories of conventional weapons not covered by the existing instruments. At its conclusion, the Conference adopted a Final Declaration, Conf. Doc. CCW/AP.II/CONF.2/WP.2 (2000), that addresses, among other topics, the following issues of importance to the United States, as discussed further below. *See also Digest 2000*, Chapter 16.1.

Statements by the U.S. Delegation excerpted below are available at [www.state.gov/s/l](http://www.state.gov/s/l).

***a. Application of the CCW and annexed Protocols to non-international armed conflicts***

Edward Cummings, Assistant Legal Adviser for Non-proliferation, U.S. Department of State, welcomed the adoption of an amendment to Article I of the Convention to extend application of the CCW and its Protocols to non-international armed conflicts, affirming that in this matter the “Conference has made a lasting contribution to international humanitarian law.” Mr. Cummings had previously observed to the Second Preparatory Committee Meeting, April 3, 2001:

The difficulty of preserving humanitarian values in time of war is apparent in all armed conflicts, international and internal. The fact is that the distinction between the types of conflicts matters little to the victims of war itself. We believe that the extension to internal conflicts of more of the principles and rules for the protection of the civilian population from the effects of hostilities would offer a significant advance without unduly restricting legitimate security requirements of a State to combat rebellion within its territory.

The Amendment to Article I provides as follows:

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1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.

2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

4. Nothing in this Convention or its annexed Protocols shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.

5. Nothing in this Convention or its annexed Protocols shall be invoked as a justification for intervening, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.

6. The application of the provisions of this Convention and its annexed Protocols to parties to a conflict which are not High Contracting Parties that have accepted this Convention or its annexed Protocols, shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.

7. The provisions of Paragraphs 2–6 of this Article shall not prejudice additional Protocols adopted after 1 January 2002, which may apply, exclude or modify the scope of their application in relation to this Article.

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***b. Explosive Remnants of War (Unexploded Ordnance)***

The Review Conference decided, with the support of the United States, to establish an open-ended Group of Governmental Experts to review several issues before the next Review Conference in December 2002. One of the issues to be

addressed by experts is Explosive Remnants of War ("ERW"), or "unexploded ordnance" ("UXO"), on which the United States had offered its views in a statement to the Second Preparatory Committee on April 5, 2001.

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The proposal to deal with UXO illustrates a noteworthy dynamic: strengthening the reliability of munitions serves both military and humanitarian objectives. On the military side, it appears to us uncontroverted that the key weapon category identified by the ICRC—the cluster munition—serves extremely valuable and important military objectives. The military utility of cluster munitions has been recognized by those seeking restrictions on their use, as was made clear, for example, in Switzerland's intervention yesterday. As compared to traditional unitary bombs, improved cluster bombs cause less destruction, reducing the harm to civilian populations during armed conflict. The particular tactical uses of cluster munitions by aircraft enable fewer sorties and thus reduce the risk to pilots. To the extent cluster munitions enable the targeting of more military objectives per sortie than the unitary bomb, they can shorten conflicts and reduce the need to deploy ground forces. All of these military advantages are strengthened when the munition has a high degree of reliability—that is, when the munition functions as designed, exploding on an intended military objective.

By the same token, a higher degree of reliability benefits both friendly military forces and civilian populations, since there is no military advantage to be gained by UXO. The unexploded ordnance—whether a submunition, artillery or mortar shell, or other munition—can only serve to compound the advance of one's military forces, since UXO can just as easily and unpredictably harm soldiers as civilians. It goes without saying that there is no legitimate military advantage in causing civilians to fear that they might set off UXO when playing in a field, walking along a river, or otherwise going about their business in an area formerly the site of hostilities.

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[T]he ICRC has suggested that anti-vehicle mines can be addressed outside the context of explosive remnants of war. We agree strongly with this approach. . .

. . . [W]e . . . believe that there are problems with some specific proposals of the ICRC. First, the ICRC's specific proposal to shift responsibility to clear UXO on the party that delivered the munition would not only be very difficult to implement but also goes counter to the long-established customary international law principle of the rights and responsibilities of the sovereign state over its territory. We are not convinced that the analogy made to the Amended Mines Protocol's provision on responsibility is entirely appropriate. The provision in Protocol II, which the U.S. proposed, is militarily feasible, as the dimensions of the responsibility are clearly established in the relevant articles of the Protocol.

Second, the ICRC has proposed dealing not just with UXO but with the use of cluster munitions near concentrations of civilians. We share the view expressed by others that existing international humanitarian law adequately regulates questions related to targeting, and that such a specific rule in the context of cluster munitions is unnecessary.

\* \* \* \*

We strongly agree with other delegations that the object of our work leading to the Review Conference should be the establishment of an open mandate for an experts process to consider the problem of UXO and measures that may effectively address that problem. These may include best practices, as the Canadian delegation has suggested, and may not lead to a protocol. As the Canadian delegation correctly noted this morning, negotiation of a protocol would, in all likelihood, take several years. Thus, CCW Parties should strongly consider taking feasible steps on a voluntary basis, unilaterally or in consultation with others, to address UXO problems in the short term. The Review Conference, in other words, should not prejudice the experts process by requiring a specific outcome, such as a draft legal instrument. The experts work should be open-ended.

\* \* \* \*

***c. Restrictions on use of anti-vehicle mines***

Mines other than anti-personnel mines (i.e., anti-vehicle landmines ("AV")) are addressed, but not substantially restricted, in the Amended Mines Protocol; they are not addressed by the Convention on the Prohibition of Anti-Personnel Landmines ("Ottawa Convention"). On September 25, the U.S. Delegation explained its proposal (jointly presented with the delegation of Denmark) for a new protocol on AV mines. The U.S.-Danish proposal attracted ten co-sponsors by the time of the Review Conference, but several delegations continued to have questions about its consistency with their military requirements. The Group of Governmental Experts established by the Final Declaration will enable continued discussion of the proposal. The U.S. Delegation described its proposal as follows:

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Our proposal has . . . two key features.

It would, first of all, prohibit the use of non-detectable anti-vehicle mines.

From a humanitarian perspective, such a prohibition would greatly facilitate the detection and clearance of anti-vehicle mines, especially on roads used by civilian traffic and humanitarian vehicles.

From a military perspective, it would help reduce casualties among peacekeepers and friendly military forces. The U.S. military believes strongly that detectability of anti-vehicle mines is actually, all things considered, militarily advantageous.

Secondly, our proposal would prohibit the use of remotely delivered anti-vehicle mines without self-destruct or self-neutralization mechanisms and a back-up self-deactivation mechanism.

Long-lived, remotely delivered mines pose serious risks to the civilian population since they could remain active in areas used by civilians long after they served their military purpose.

Self-destruct or self-neutralization mechanisms and self-deactivation features on such mines would address that problem.



Self-destruct also make sense from a military perspective, reducing the risks to one's own forces, without compromising legitimate military uses of remotely-delivered mines.

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Let me make a few general points about our proposal that I hope will address some of the questions that have been raised.

First, our proposal does not address anti-personnel mines and does not change any obligations relating to such mines in the AMP. . . .

Second, it is important to stress that our proposal does not cover, at all, issues of stockpiling. This means that states can adopt, indeed even ratify, the AV mine protocol without having to change, modify or destroy their stockpiles. They comply as long as the mines, when actually used, that is, when emplaced, satisfy the requirements.

Third, it follows that if a state already has non-detectable mines in the ground, our proposal would not require removing them since it concerns the use—the emplacement—of mines after entry into force, not before.

Fourth, it bears repeating that our proposal does not require self-destruction mechanisms for mines that are not remotely-delivered, such as hand-emplaced mines that may be used in long-term border minefields.

Fifth, our proposal applies the same reliability numbers for self-destruct and self-deactivation (SD/SDA) for remotely-delivered AV mines as for remotely-delivered AP mines agreed to in 1996 when the AMP was adopted.

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#### **d. Compliance**

Article 13 of the Amended Mines Protocol provides for an annual conference of States Parties, at which compliance matters may be raised and addressed. Article 14 provides for penal sanctions against violations. However, the Protocol does not contain a mandatory regime to verify compliance. The United States, as it did in 1995, strongly advocated that parties to the Amended Mines Protocol adopt a compliance

and verification mechanism to deal with legitimate complaints of misuse of landmines. The proposed mechanism involved a filtering of complaints to ensure that legitimate claims—and not ones driven by political agendas—would be heard by other governments, and that experts would have an opportunity to examine the merits of the complaint in the field. *See* Conf. Doc. CCW/AP.II/CONF.2/WP.2 (2000). It also provided a mechanism to protect ongoing military operations and for application in a manner consistent with the investigated State's constitutional obligations.

No consensus was reached on this point and the Review Conference decided to encourage delegations to continue to discuss issues associated with compliance.

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## C. NUCLEAR NON-PROLIFERATION

### 1. Protection Against Nuclear Terrorism

On November 30, the head of the International Atomic Energy Agency ("IAEA") presented a report to the Board of Governors outlining plans for substantially expanding and strengthening IAEA programs relevant to improving nuclear security. An IAEA press release noted that "[p]ast efforts have focused largely on diversion of nuclear material by States for non-peaceful purposes, without the same degree of focus on malicious activities by sub-national groups—thus creating a gap between the risk of nuclear terrorism and existing response capabilities."

Secretary of Energy Spencer Abraham, speaking to the IAEA Board of Governors on the same day, welcomed the Director General's report and provided the views of the United States, as contained in the excerpts below.

The full text of the IAEA press release is available at [www.iaea.org/worldatom/Press/P\\_release/2001/](http://www.iaea.org/worldatom/Press/P_release/2001/). Secretary Abraham's remarks are available at [www.energy.gov/HQDocs/speeches/2001/novss/IAEA\\_Board\\_Gov.html](http://www.energy.gov/HQDocs/speeches/2001/novss/IAEA_Board_Gov.html).

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We have seen the establishment of a global coalition against terrorism. Under the leadership of President Bush, that coalition has moved decisively to eradicate a threat that challenges every civilized nation. The attacks of September 11 were an attack on all civilized countries, whose consequences are like a tidal wave causing economic and human suffering around the world, especially in the developing world. The consequences of nuclear terrorism would be even more devastating to the world and countries that depend on international trade—to say nothing of the effect on public confidence in the safety of peaceful nuclear activities ranging from power to the eradication of insects.

The IAEA and its robust system of inspections is vital to international security. That pivotal role was acknowledged by Presidents Bush and Putin during the recently concluded U.S.-Russian summit. They reaffirmed their commitment to keeping dangerous materials out of the hands of those like Osama bin Ladin, who would not think twice about using them against any of us. The two Presidents declared that “urgent attention must be given to improving the physical protection and accounting of nuclear materials of all possessor states, and preventing illicit trafficking.”

In furtherance of this commitment, I held a series of meetings in Moscow this week with my Russian counterpart and colleague, Minister of Atomic Energy Alexander Rumyantsev. In addition to agreeing to accelerate and expand U.S.-Russian cooperation in protecting nuclear material, we also agreed to work together toward more effective international support of our two Presidents’ call for action. To that end, we will coordinate our efforts with other countries and with the IAEA to improve the protection of fissile nuclear material and thereby strengthen international security. We specifically discussed the essential role of the IAEA in this regard.

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[One] thing we can all do is work to revise and strengthen the Convention for the Physical Protection of Nuclear Material. We view this as an urgent matter.

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## **2. U.S.-Russia on Strengthening Nuclear Material Protection**

### ***a. Agreement announcement***

On November 29, 2001, Secretary of Energy Spencer Abraham and Russian Federation Minister of Atomic Energy Alexander Rumyantsev agreed to accelerate and expand joint U.S.-Russian efforts to strengthen the protection of nuclear material. They issued a formal statement at the conclusion of their meetings, set forth below.

The full text of the Press Release is available at [www.usinfo.state.gov/topical/pol/arms/stories/01120404.htm](http://www.usinfo.state.gov/topical/pol/arms/stories/01120404.htm).

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The Secretary and the Minister agreed on the necessity of closer cooperation on enhancing the nuclear weapons non-proliferation regime, improving measures on nuclear materials physical protection, control and accounting as well as preventing illegal trafficking and handling of nuclear and radioactive materials.

In this respect the Secretary and the Minister noted the importance of coordinating their efforts and cooperating with other countries and with the International Atomic Energy Agency to increase efforts toward the protection of fissile nuclear material in order to strengthen international security and to bolster safety and security in the peaceful use of atomic power for the benefit of increasing the economic well being and prosperity of the peoples of the world.

The Secretary and the Minister directed their subordinates to analyze the efficiency of the present cooperation and progress in accelerating that cooperation and to prepare appropriate reports for them on how to perfect, enhance and expand the cooperation that they will consider at their next joint meeting.

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### ***b. Other Steps***

On December 27, 2001, the White House issued a Fact Sheet reporting the results of a review of U.S. nonproliferation and threat reduction assistance to the Russian Federation and future

plans for assistance. In conclusion, it cited a statement by President Bush on December 11, 2001, set forth below.

The full text of the Fact Sheet is available at [www.white-house.gov/news/releases/2001/12/20011227.html](http://www.white-house.gov/news/releases/2001/12/20011227.html).

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Together, we must keep the world's most dangerous technologies out of the hands of the world's most dangerous people. A crucial partner in this effort is Russia—a nation we are helping to dismantle strategic weapons, reduce nuclear material, and increase security at nuclear sites. Our two countries will expand efforts to provide peaceful employment for scientists who formerly worked in Soviet weapons facilities. The United States will also work with Russia to build a facility to destroy tons of nerve agent. I'll request an over-all increase in funding to support this vital mission.

### **3. Control of Missile Technology**

The United States was an active participant in the Plenary Meeting of the Missile Technology Control Regime ("MTCR") in Ottawa, September 25–28, 2001. The MTCR seeks to establish a common approach for exports of technologies that could contribute to proliferation of ballistic and cruise missiles with specified capabilities. The Plenary noted, among other things, that the events of September 11, 2001, in the United States added to the importance of the MTCR's work on combating the risk of proliferation of weapons of mass destruction and their means of delivery. A Fact Sheet issued by the Department of State describes the MTCR and the focus of its concerns.

The Fact Sheet is available at [www.state.gov/t/np/rls/fs/2001/5310.htm](http://www.state.gov/t/np/rls/fs/2001/5310.htm).

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The MTCR was established in 1987 with the aim of controlling exports of missiles capable of delivering weapons of mass

destruction. The 33 countries\* of the MTCR form an important international arrangement dealing with such missiles, as well as related equipment and technology.

Coordinating their efforts through the MTCR, its member states have contributed significantly to a reduction in the global missile proliferation threat. The Plenary however agreed that the risk of proliferation of weapons of mass destruction and their means of delivery remained a major concern for global and regional security, and that more must therefore be done at the national, regional, and global level. The Plenary also noted that the tragic events of September 11, 2001, in the United States only added force to the importance of the MTCR's work in that regard.

The Plenary re-emphasized the important role played by export controls, the need to strengthen them further, the need for their strict implementation, and the need for adaptation in the face of technological development.

Partners continued their deliberations on a set of principles, general measures, cooperation, and confidence-building measures in the form of a draft International Code of Conduct against ballistic missile proliferation, taking into account the results of extensive contact on this subject undertaken with countries outside the MTCR since the Helsinki Plenary. The result of these deliberations was an augmented draft text, which will be distributed to all states at an early date.

Universalization of the draft Code should take place through a transparent and inclusive negotiating process open to all states on the basis of equality. In this regard, the Plenary noted with appreciation the offer of France to host the first negotiation session in 2002. France will consult with all states to determine their interest in participating in the process.

This concludes the work of the MTCR *per se* on the draft Code.

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\* Argentina, Australia, Austria, Belgium, Brazil, Canada, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, the Republic of Korea, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Russia, South Africa, Spain, Sweden, Switzerland, Turkey, Ukraine, the United Kingdom, and the United States.

#### **4. Highly Enriched Uranium**

In 1993, the United States and the Russian Federation entered into an international agreement for the conversion of highly enriched uranium ("HEU") extracted from Russian nuclear weapons into low enriched uranium for use in commercial nuclear reactors. Under the 1993 agreement and related contracts and agreements (collectively, the "HEU Agreements"), 500 metric tons of highly enriched uranium will be converted to low enriched uranium over a 20 year period, the equivalent of 20,000 nuclear warheads. In order to protect property of the Russian Federation directly relating to the implementation of the HEU Agreements that might come into the United States or within the possession or control of U.S. persons, President Clinton issued Executive Order 13159 on June 21, 2000 blocking such property and interests in it. In June 2001, President Bush declared that the national emergency declared on June 21, 2000, must continue in order to provide continued protection for the property at issue. 66 Fed.Reg.32207 (June 14, 2001). The excerpts that follow explain the basis for the order.

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On June 21, 2000, President Clinton issued Executive Order 13159 (the "Order") blocking property and interests in property of the Government of the Russian Federation that are in the United States, that hereafter come within the United States, or that are or hereinafter come within the possession or control of U.S. persons that are directly related to the implementation of the Agreement Between the Government of the United States of America and the Government of the Russian Federation concerning the disposition of highly enriched uranium extracted from nuclear weapons, dated February 18, 1993, and related contracts and agreements (collectively, the "HEU Agreements"). The HEU Agreements allow for the downblending of highly enriched uranium derived from nuclear weapons to low enriched uranium for peaceful commercial purposes. The Order invoked the authority, *inter alia*, of the International Emergency Economic Powers Act, 50 U.S.C. et seq., and declared a national emergency to deal with the threat to the national security and foreign policy of the United

States posed by the risk of nuclear proliferation created by the accumulation of a large volume of weapons-usable fissile material in the territory of the Russian Federation.

A major national security goal of the United States is to ensure that fissile material removed from Russian nuclear weapons pursuant to various arms control and disarmament agreements is downblended to low enriched uranium for peaceful commercial uses, subject to transparency measures, and protected from diversion to activities of proliferation concern.

Pursuant to the HEU Agreements, weapons-grade uranium extracted from Russian nuclear weapons is converted to low enriched uranium for use as fuel in commercial nuclear reactors. The Order blocks and protects from attachment, judgment, decree, lien, execution, garnishment, or other judicial process the property and interests in property of the Government of the Russian Federation that are directly related to the implementation of the HEU Agreements and that are in the United States, that hereafter come within the United States, or that are or hereafter come within the possession or control of United States persons.

The national emergency declared on June 21, 2000, must continue beyond June 21, 2001, to provide continued protection from attachment, judgment, decree, lien, execution, garnishment, or other judicial process the property and interests in property of the Government of the Russian Federation that are directly related to the implementation of the HEU Agreements and subject to U.S. jurisdiction. Therefore, in accordance with section 202(d) of the National Emergencies Act (50 U.S.C. 1622(d)), I am continuing the national emergency with respect to weapons-usable fissile material in the territory of the Russian Federation. This notice shall be published in the Federal Register and transmitted to the Congress.

## **5. Cooperative Threat Reduction Agreement**

On June 5, 2001, Secretary of State Colin Powell and Uzbek Foreign Minister Abdulaziz Kamilov signed a Cooperative Threat Reduction Agreement in Washington to enable enhanced defense cooperation and joint work under the Department of Defense Cooperative Threat Reduction pro-



gram to prevent the proliferation of weapons of mass destruction and technology and expertise. The Agreement entered into force on the same date, for a period of seven years. Specifically, as provided under Article I of the Agreement set forth below, cooperation will include the dismantlement of Soviet nuclear, chemical and biological weapons facilities left on the territory of Uzbekistan at the time of independence.

The full text of the Agreement is available at [www.state.gov/s/l/](http://www.state.gov/s/l/).

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## ARTICLE I

1. The Government of the United States of America may, as agreed by the Parties, provide assistance as requested and deemed appropriate by the Government of the Republic of Uzbekistan in achieving the following objectives;
  - a. The establishment of verifiable measures against the proliferation of weapons of mass destruction through the territory of the Republic of Uzbekistan, and technology, materials, and expertise related to such weapons;
  - b. The development of measures that will prevent the illegal transfer & transportation of nuclear, biological, or chemical weapons and related materials as well as weapons usable technology and pathogens;
  - c. The elimination or dismantlement of the infrastructure remaining in the territory of the Republic of Uzbekistan which may have directly supported weapons of mass destruction;
  - d. The promotion of bilateral defense contacts, through regular meetings, visits and exchanges;
  - e. Such other areas as agreed to in writing by the Parties,
2. The terms of this Agreement shall apply to any kind of assistance provided by the Government of the United States of America under this Agreement and under any subsequent implementing agreements and arrangements and to all personnel and activities required for the implementation of such

agreements and arrangements. All material, equipment, training, and services provided in accordance with this Agreement shall be used exclusively for the purposes for which they are provided by the Government of the United States of America in support of the objectives listed in paragraph 1 of this Article.

## 6. Policy towards North Korea

a. On June 6, 2001, President Bush issued a statement concerning U.S. policy towards North Korea and suggesting a possible link to assistance and easing of sanctions. The President's statement, excerpted below, is available at <http://www.whitehouse.gov/news/releases/2001/06/20010611-4.html>.

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\*   \*   \*   \*

We have now completed our review. I have directed my national security team to undertake serious discussions with North Korea on a broad agenda to include: improved implementation of the Agreed Framework relating to North Korea's nuclear activities; verifiable constraints on North Korea's missile programs and a ban on its missile exports; and a less threatening conventional military posture.

\*   \*   \*   \*

Our approach will offer North Korea the opportunity to demonstrate the seriousness of its desire for improved relations. If North Korea responds affirmatively and takes appropriate action, we will expand our efforts to help the North Korean people, ease sanctions, and take other political steps.

\*   \*   \*   \*

b. Elaborating on the United States position, Charles L. Pritchard, Special U.S. Envoy for Negotiations with the Democratic Peoples' Republic of Korea and United States Representative to the Korean Peninsula Energy Development organization, testified as follows before the House International Relations Subcommittee on East Asia and the Pacific.

The full text is available at <http://www.usinfo.state.gov/topical/pol/arms/stories/01073604.htm>.

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\* \* \* \*

In the week following the President's announcement of our policy review conclusions, I transmitted to my North Korean counterpart, Vice Minister Kim Gye Gwan, our interest in meeting for bilateral talks. We set no preconditions, and I deferred to Vice Minister Kim to select a date and venue. Our interest is not to get bogged down in procedural matters but rather to discuss issues of concern and offer North Korea the opportunity to demonstrate the seriousness of its stated desire for improved relations with the United States.

\* \* \* \*

## Missile Issues

Missile issues are important and we will seek to address them in talks with the North. Our concerns can basically be divided into two areas: indigenous missile development/deployment and missile exports. North Korea's own missile development/deployment efforts already threaten U.S. forces and allies in East Asia. Its efforts to develop intercontinental ballistic missiles pose direct threats to the United States and thus are extremely destabilizing. We have taken note of Chairman Kim Jong Il's statement that he will maintain until 2003 the long-range missile launch moratorium. It should be clear that North Korea's launching of a long-range missile would have serious consequences for regional security, return the Peninsula to a state of high tension, prompt widespread international condemnation, and do grave harm to North Korea's relations with the United States.

North Korea's missile exports, which arm states in already-tense regions, threaten U.S. forces and friends in the Middle East and are irresponsible. Missile exports provide the DPRK a key source of hard currency, ways to cultivate outside relations, and a means to support R&D on more advanced missile systems.

We therefore need to work vigorously, bilaterally and with

allies and like-minded countries, to constrain DPRK missile activities. In particular, we want to pursue discussions with North Korea aimed at reaching agreement to constrain its domestic and export programs. As the President has stated, effective verification measures will be an essential component of any missile agreement with North Korea. Verifiable constraints on the DPRK missile program will give us confidence that North Korea is abiding by its commitments and thus are vital to meaningful progress in U.S.-DPRK relations.

### **Agreed Framework Issues**

We have carefully reviewed the implementation of the Agreed Framework and have stated that the United States will abide by its commitments and expects North Korea to do the same. Indeed, improved implementation of the Agreed Framework provisions relating to North Korea's nuclear activities is one of our top priorities. With the support of the Congress, we will continue to deliver through the Korean Peninsula Energy Development Organization (KEDO) 500,000 metric tons of heavy fuel oil each year until the completion of the first of two light water reactors being built by KEDO. Excavation begins at the site this autumn, and the project will reach a major turning point next year when the "first concrete" is poured.

As you know, the Agreed Framework calls for the DPRK to come into full compliance with its International Atomic Energy Agency (IAEA) safeguards agreement before the delivery of key nuclear components can occur. North Korean cooperation with the IAEA will be a top priority in our anticipated dialogue with the DPRK.

In the past, maintaining North Korea's freeze on its nuclear facilities and safely storing the spent fuel from one of its frozen reactors demanded much of the immediate attention. As the KEDO project switches into high gear, however, the DPRK's cooperation with the IAEA will become increasingly important. Although the date for delivering key nuclear components is still in the future, the DPRK must begin active cooperation soon, to avoid serious delays in the KEDO project. Cooperation with the IAEA is central to successful implementation of the Agreed Framework and a prerequisite for completing the light water reactors.

Conventional Forces

There is no question that the most immediate and pressing threat on the Korean Peninsula comes from North Korea’s robust conventional forces and their forward posture. We are determined to work with our South Korean ally to address our shared concerns over this threat.

\* \* \* \*

Humanitarian Concerns

Finally, let me note that we continue to seek to help the North Korean people address the most pressing problems, including starvation and oppression. We will continue to respond to the World Food Program’s appeals, and we will also press the North Korean government to increase the number of monitors and allow the WFP’s monitors the freedom of movement that they need to ensure that international assistance reaches its intended recipients. . . .

\* \* \* \*

Cross References

- Exercise of inherent right of self-defense by United States*, Chapter 19.A. and B.
- Lifting of certain sanctions on India and Pakistan*, Chapter 16.D.



## CHAPTER 19

# Response of the United States to Terrorist Attacks

### A. BACKGROUND

On September 11, 2001, nineteen terrorists working in groups of four or five simultaneously hijacked four commercial airplanes, each with a significant number of passengers and fully loaded with fuel for cross-country flights. Two groups of hijackers forcibly gained control of planes departing from Boston and flew them into the Twin Towers of the World Trade Center in New York City. The towers themselves collapsed completely, killing some 3,000 people, and a number of surrounding buildings either collapsed in turn or were rendered physically unstable. A third plane was hijacked and flown into the side of the Pentagon in Arlington, Virginia, destroying one segment of the building and killing 186 people. The fourth hijacked plane crashed in Shanksville, Pennsylvania, evidently following a scuffle between the terrorists and several passengers who may have been attempting to retake control of the airplane. The hijackers and all passengers on board all four airplanes were killed.

The international community immediately and unequivocally condemned the attacks and expressed solidarity with the United States. The next day, September 12, the United Nations General Assembly, by consensus of the 189 member states, called for international cooperation to prevent and eradicate acts of terrorism and to hold accountable the perpetrators and those who harbor or support them. U.N. Doc. A/56/1 (2001). On the same day, the United Nations Security Council unanimously adopted Resolution 1368, in

which it “unequivocally condemn[ed] in the strongest terms the horrifying terrorist attacks” of September 11, finding them to be a threat to international peace and security. The resolution recognized “the inherent right of individual or collective self-defence in accordance with the [UN] Charter,” called on all countries to “work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks” and stressed “that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable.” U.N. Doc. S/Res/1368 (2001).

The full texts of the General Assembly and Security Council Resolutions are available at [www.un.org/Docs/scres/2001/sc2001.htm](http://www.un.org/Docs/scres/2001/sc2001.htm).

#### **1. National Addresses by President Bush: “War Against Terrorism”**

In an Address to the Nation on the evening of September 11, excerpted below, the President announced that the United States was engaged in a “war against terrorism.”

The full text of the address is available at [www.white-house.gov/news/releases/2001/09/20010911-16.html](http://www.white-house.gov/news/releases/2001/09/20010911-16.html).

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Immediately following the first attack, I implemented our government’s emergency response plans. Our military is powerful, and it’s prepared. Our emergency teams are working in New York City and Washington, D.C. to help with local rescue efforts.

Our first priority is to get help to those who have been injured, and to take every precaution to protect our citizens at home and around the world from further attacks.

The functions of our government continue without interruption. Federal agencies in Washington which had to be evacuated today are reopening for essential personnel tonight, and will be open for business tomorrow. Our financial institutions remain strong, and the American economy will be open for business, as well.

The search is underway for those who are behind these evil



acts. I've directed the full resources of our intelligence and law enforcement communities to find those responsible and to bring them to justice. We will make no distinction between the terrorists who committed these acts and those who harbor them.

I appreciate so very much the members of Congress who have joined me in strongly condemning these attacks. And on behalf of the American people, I thank the many world leaders who have called to offer their condolences and assistance.

America and our friends and allies join with all those who want peace and security in the world, and we stand together to win the war against terrorism. . . .

\* \* \* \*

Excerpts below from the President's address to the Joint Session of Congress on September 20, 2001, describe the new kind of campaign envisioned.

The full text is available at [www.whitehouse.gov/news/releases/2001/09/2010920-8.html](http://www.whitehouse.gov/news/releases/2001/09/2010920-8.html).

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On September the 11th, enemies of freedom committed an act of war against our country. Americans have known wars—but for the past 136 years, they have been wars on foreign soil, except for one Sunday in 1941. Americans have known the casualties of war—but not at the center of a great city on a peaceful morning. Americans have known surprise attacks—but never before on thousands of civilians. All of this was brought upon us in a single day—and night fell on a different world, a world where freedom itself is under attack.

Americans have many questions tonight. Americans are asking: Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole.

Al Qaeda is to terror what the mafia is to crime. But its goal is not making money; its goal is remaking the world—and imposing its radical beliefs on people everywhere.

The terrorists practice a fringe form of Islamic extremism that

has been rejected by Muslim scholars and the vast majority of Muslim clerics—a fringe movement that perverts the peaceful teachings of Islam. The terrorists' directive commands them to kill Christians and Jews, to kill all Americans, and make no distinction among military and civilians, including women and children.

This group and its leader—a person named Osama bin Laden—are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction.

The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world. Afghanistan's people have been brutalized—many are starving and many have fled. Women are not allowed to attend school. You can be jailed for owning a television. Religion can be practiced only as their leaders dictate. A man can be jailed in Afghanistan if his beard is not long enough.

The United States respects the people of Afghanistan—after all, we are currently its largest source of humanitarian aid—but we condemn the Taliban regime. . . . It is not only repressing its own people, it is threatening people everywhere by sponsoring and sheltering and supplying terrorists. By aiding and abetting murder, the Taliban regime is committing murder.

And tonight, the United States of America makes the following demands on the Taliban: Deliver to United States authorities all the leaders of al Qaeda who hide in your land. . . . Release all foreign nationals, including American citizens, you have unjustly imprisoned. Protect foreign journalists, diplomats and aid workers in your country. Close immediately and permanently every terrorist training camp in Afghanistan, and hand over every terrorist, and every person in their support structure, to appropriate authorities. . . . Give the United States full access to terrorist training camps, so we can make sure they are no longer operating.

These demands are not open to negotiation or discussion. The

Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate.

I also want to speak tonight directly to Muslims throughout the world. We respect your faith. It's practiced freely by many millions of Americans, and by millions more in countries that America counts as friends. Its teachings are good and peaceful, and those who commit evil in the name of Allah blaspheme the name of Allah. . . . The terrorists are traitors to their own faith, trying, in effect, to hijack Islam itself. The enemy of America is not our many Muslim friends; it is not our many Arab friends. Our enemy is a radical network of terrorists, and every government that supports them. . . .

Our war on terror begins with al Qaeda, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.

\* \* \* \*

Americans are asking: How will we fight and win this war? We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.

This war will not be like the war against Iraq a decade ago, with a decisive liberation of territory and a swift conclusion. It will not look like the air war above Kosovo two years ago, where no ground troops were used and not a single American was lost in combat.

Our response involves far more than instant retaliation and isolated strikes. Americans should not expect one battle, but a lengthy campaign, unlike any other we have ever seen. It may include dramatic strikes, visible on TV, and covert operations, secret even in success. We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. . . . From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime.

Our nation has been put on notice: We are not immune from attack. We will take defensive measures against terrorism to protect Americans. Today, dozens of federal departments and agencies, as well as state and local governments, have responsibilities affecting homeland security. These efforts must be coordinated at the highest level. So tonight I announce the creation of a Cabinet-level position reporting directly to me—the Office of Homeland Security.

\* \* \* \*

Many will be involved in this effort, from FBI agents to intelligence operatives to the reservists we have called to active duty. All deserve our thanks, and all have our prayers. And tonight, a few miles from the damaged Pentagon, I have a message for our military: Be ready. I've called the Armed Forces to alert, and there is a reason. The hour is coming when America will act, and you will make us proud. . . .

This is not, however, just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and pluralism, tolerance and freedom.

We ask every nation to join us. We will ask, and we will need, the help of police forces, intelligence services, and banking systems around the world. The United States is grateful that many nations and many international organizations have already responded—with sympathy and with support. Nations from Latin America, to Asia, to Africa, to Europe, to the Islamic world. Perhaps the NATO Charter reflects best the attitude of the world: An attack on one is an attack on all.

The civilized world is rallying to America's side. They understand that if this terror goes unpunished, their own cities, their own citizens may be next. Terror, unanswered, can not only bring down buildings, it can threaten the stability of legitimate governments. . . . [W]e're not going to allow it. . . .

\* \* \* \*

## **2. International Response**

As noted above, both the General Assembly and the Security Council of the United Nations took action on September 12,

2001 condemning the attacks on the United States. On September 28, 2001, the Security Council adopted Resolution 1373, again condemning the attacks and reaffirming the inherent right of self-defense. Further, it decided, among other things, that “all States shall [] refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts . . . [and] deny safe haven to those who finance, plan, support, or commit terrorist acts, or provide safe havens.” U.N. Doc. S/Res/1373 (2001).

Other international bodies similarly expressed their support for the United States.

**a. *North Atlantic Treaty Organization***

On September 12, the North Atlantic Council of the North Atlantic Treaty Organization (“NATO”) met and issued a statement in which it agreed that “if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.” The statement provided further:

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The commitment to collective self-defence embodied in the Washington Treaty was first entered into in circumstances very different from those that exist now, but it remains no less valid and no less essential today, in a world subject to the scourge of international terrorism. When the Heads of State and Government of NATO met in Washington in 1999, they paid tribute to the success of the Alliance in ensuring the freedom of its members during the Cold War and in making possible a Europe that was whole and free. But they also recognised the existence of a wide variety of risks to security, some of them quite unlike those that had called NATO into existence. More specifically, they condemned terrorism as a serious threat to peace and stability and reaffirmed their determination to combat it in accordance with their commitments to one another, their international commitments and national legislation.

Article 5 of the Washington Treaty stipulates that in the event of attacks falling within its purview, each Ally will assist the Party that has been attacked by taking such action as it deems necessary. Accordingly, the United States' NATO Allies stand ready to provide the assistance that may be required as a consequence of these acts of barbarism.

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On October 2 NATO Secretary General, Lord Robertson, issued a statement, concluding that "it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by Article 5 of the Washington Treaty. . . . [T]he United States of America can rely on the full support of its 18 NATO Allies in the campaign against terrorism."

The full texts of the two statements are available at [www.nato.int/docu/pr/2001/p01-124e.htm](http://www.nato.int/docu/pr/2001/p01-124e.htm) and [www.nato.int/docu/speech/2001/s01102a.htm](http://www.nato.int/docu/speech/2001/s01102a.htm), respectively.

**b. ANZUS**

The Australian Government announced in a press release on September 14, 2001, that it had decided "that Article IV of the ANZUS treaty applies to the terrorist attacks on the United States." The ANZUS treaty (Security Treaty between Australia, New Zealand, and the United States, done at San Francisco September 1, 1951, entered into force April 29, 1952, 3 U.S.T. 3420(1951), 1952 Austl. T.S. No. 2) addresses mutual security endeavors in response to armed attacks on one of the parties. Article IV obligates the Parties to "act to meet the common danger" presented by an armed attack on any of them in the Pacific Area.

**c. Organization of American States**

On September 19, the Permanent Council ("PC") of the Organization of American States ("OAS") issued a resolution "recalling the inherent right of the United States and

each of the other Member States to act in the exercise of the right of individual and collective self-defense recognized by Article 51 of the Charter of the United Nations.” CP/RES. 796 (1293/01). The resolution also “condemn[s], as an attack against all the States of the Americas, the acts of terrorism perpetrated within the territory of the United States of America on September 11, 2001, that resulted in the murder of thousands of citizens from many member states and other nations.” *Id.*

The OAS also convoked a Meeting of Consultation of the Foreign Ministers. On September 21, 2001, the Foreign Ministers issued a resolution condemning the September 11 attacks and “recognizing the inherent right of individual and collective self defense in accordance with the Charters of the Organization of American States and the United Nations.” See OEA/Ser.F/II.23 RC.23/RES 1/01 rev. 1.

**d. *European Council***

Also on September 21, 2001, the European Council declared that “[o]n the basis of Security Council Resolution 1368, a riposte by the US is legitimate.” It also set forth a plan of action to combat terrorism. The full text is available at <http://ue.eu.int/newsroom/newmain.asp?lang=1>.

**e. *Rio Treaty***

The Foreign Ministers of the Western Hemisphere, convoked in Washington under the Inter-American Treaty of Reciprocal Assistance, 324 U.N.T.S. 21 (Dec. 20, 1948), OAS Treaty Series 8 and 61 (“Rio Treaty”), approved a resolution on September 21 stating that “these terrorist attacks against the United States of America are attacks against all American states” and that “all parties to the Rio Treaty shall provide effective reciprocal assistance to address such attacks and the threat of any similar attacks against any American state and to maintain the peace and security of the continent.” OEA/Ser. F/II.24 RC.24/RES. 1/01 rev. 1.

A follow-up Committee established under the resolution met on October 16 and issued a resolution stating that measures being put in place by the United States and other countries exercising their right of individual and collective self-defense have “the full support of the states parties to the Inter-American Treaty of Reciprocal Assistance (Rio Treaty).” The resolution also states that the states parties to the Rio Treaty “reiterate their willingness to provide additional assistance and support to the United States and to one another, as appropriate.”

## **B. MILITARY RESPONSES: EXERCISE OF SELF-DEFENSE BY THE UNITED STATES**

### **1. Authority for Use of Force following Attacks of September 11**

#### ***a. Authorization for use of force by Congress***

##### ***(1) Joint Resolution***

On September 14, the House and Senate of the United States Congress passed a Joint Resolution, authorizing the President to “use all necessary and appropriate force” in responding to the September 11 attacks. Pub. L. No. 107-40, 115 Stat. 225. The Joint Resolution provided as follows:

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Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and



Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

\* \* \* \*

## SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL.—That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided to terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) WAR POWERS RESOLUTION REQUIREMENTS.—

(1) SPECIFIC STATUTORY AUTHORIZATION.—Consistent with section (a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.<sup>1</sup>

(2) APPLICABILITY OF OTHER REQUIREMENTS.—Nothing in this resolution supercedes any requirement of the War Powers Resolution.

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<sup>1</sup> [Editor's Note: Section 5(b) of the War Powers Resolution, Pub. L. No. 93-148 (1973), 50 U.S.C. § 1544(b), provides:

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to Section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or *has enacted a specific authorization for such use of United States Armed Forces. . . .*” [emphasis added].

For further discussion of the War Powers Resolution, see *Digest 1981–1988*, Chapter 14, § 2, at 3411.]

*(2) President's Signing Statement*

In signing the Joint Resolution on September 18, 2001, 37 WEEKLY COMP. PRES. DOC. 1333 (Sept. 24, 2001), President George W. Bush stated:

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On September 11, 2001, terrorists committed treacherous and horrific acts of violence against innocent Americans and individuals from other countries. Civilized nations and people around the world have expressed outrage at, and have unequivocally condemned, these attacks. Those who plan, authorize, commit, or aid terrorist attacks against the United States and its interests—including those who harbor terrorists—threaten the national security of the United States. It is, therefore, necessary and appropriate that the United States exercise its rights to defend itself and protect United States citizens both at home and abroad.

***b. President's Declaration of National Emergency***

On September 14, 2001, President Bush also declared a national emergency, effective since September 11, 2001, triggering a number of statutory authorities for responding to the September 11, 2001 attacks. Declaration of National Emergency by Reason of Certain Terrorist Attacks, September 14, 2001. 66 Fed.Reg. 48199 (Sept. 18, 2001). The Declaration provides:

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A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.

NOW, THEREFORE, I, GEORGE W. BUSH, President of the United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, hereby declare that the national emergency has existed since September 11, 2001, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of

title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code.

This proclamation immediately shall be published in the Federal Register or disseminated through the Emergency Federal Register, and transmitted to the Congress.

This proclamation is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

\* \* \* \*

## 2. Measures of Self-defense

At a press conference on September 17, 2001, the White House spokesman, Ari Fleischer, was asked if the Executive Order forbidding the use of assassination was still in effect. The reference was to Executive Order 12333 on United States Intelligence Activities, December 4, 1981, which provides among other things, that “[n]o person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination.” 46 Fed.Reg. 59941 (December 8, 1981). Mr. Fleischer responded, “It is in effect, but it does not limit America’s ability to act in self-defense.” (See also *Digest 1981–1988*, Chapter 14, § 8, at 3625.)

The full text of the press conference is available at [www.whitehouse.gov/news/releases/2001/09/20010917-3.html](http://www.whitehouse.gov/news/releases/2001/09/20010917-3.html).

## 3. Air Strikes in Afghanistan

On October 7, 2001 the United States and the United Kingdom commenced air strikes against al-Qaeda training camps and Taliban military installations in Afghanistan. Excerpts below from President Bush’s address to the nation that day describe the strikes and outline the United States position and goals.

The full text of the address is available at [www.whitehouse.gov/news/releases/2001/10/20011007-8.html](http://www.whitehouse.gov/news/releases/2001/10/20011007-8.html).

\* \* \* \*

More than two weeks ago, I gave Taliban leaders a series of clear and specific demands: Close terrorist training camps; hand

over leaders of the al Qaeda network; and return all foreign nationals, including American citizens, unjustly detained in your country. None of these demands were met. And now the Taliban will pay a price. By destroying camps and disrupting communications, we will make it more difficult for the terror network to train new recruits and coordinate their evil plans.

Initially, the terrorists may burrow deeper into caves and other entrenched hiding places. Our military action is also designed to clear the way for sustained, comprehensive and relentless operations to drive them out and bring them to justice.

At the same time, the oppressed people of Afghanistan will know the generosity of America and our allies. As we strike military targets, we'll also drop food, medicine and supplies to the starving and suffering men and women and children of Afghanistan.

The United States of America is a friend to the Afghan people, and we are the friends of almost a billion worldwide who practice the Islamic faith. The United States of America is an enemy of those who aid terrorists and of the barbaric criminals who profane a great religion by committing murder in its name.

This military action is a part of our campaign against terrorism, another front in a war that has already been joined through diplomacy, intelligence, the freezing of financial assets and the arrests of known terrorists by law enforcement agents in 38 countries. Given the nature and reach of our enemies, we will win this conflict by the patient accumulation of successes, by meeting a series of challenges with determination and will and purpose.

Today we focus on Afghanistan, but the battle is broader. Every nation has a choice to make. In this conflict, there is no neutral ground. If any government sponsors the outlaws and killers of innocents, they have become outlaws and murderers, themselves. And they will take that lonely path at their own peril.

I'm speaking to you today from the Treaty Room of the White House, a place where American Presidents have worked for peace. We're a peaceful nation. Yet, as we have learned, so suddenly and so tragically, there can be no peace in a world of sudden terror. In the face of today's new threat, the only way to pursue peace is to pursue those who threaten it.

We did not ask for this mission, but we will fulfill it. The name of today's military operation is Enduring Freedom. We defend not

only our precious freedoms, but also the freedom of people everywhere to live and raise their children free from fear.

I know many Americans feel fear today. And our government is taking strong precautions. All law enforcement and intelligence agencies are working aggressively around America, around the world and around the clock. At my request, many governors have activated the National Guard to strengthen airport security. We have called up Reserves to reinforce our military capability and strengthen the protection of our homeland.

In the months ahead, our patience will be one of our strengths—patience with the long waits that will result from tighter security; patience and understanding that it will take time to achieve our goals; patience in all the sacrifices that may come.

\* \* \* \*

#### 4. Article 51 Report to the United Nations

On October 7, 2001 the United States reported to the Security Council in accordance with Article 51 of the United Nations Charter,<sup>3</sup> that the United States of America, together with other States, was exercising its inherent right of individual and collective self-defense and would continue its humanitarian efforts in Afghanistan. UN Doc. S/2001/946 (2001). The report to the United Nations provided as follows:

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In accordance with Article 51 of the Charter of the United Nations, I wish, on behalf of my Government, to report that the United States of America, together with other States, has initiated actions in the exercise of its inherent right of individual and collective

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<sup>3</sup> Article 51 provides: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. *Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council* and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.” [Emphasis added]

self-defence following the armed attacks that were carried out against the United States on 11 September 2001.

On 11 September 2001, the United States was the victim of massive and brutal attacks in the states of New York, Pennsylvania and Virginia. These attacks were specifically designed to maximize the loss of life; they resulted in the death of more than 5,000 persons, including nationals of 81 countries, as well as the destruction of four civilian aircraft, the World Trade Center towers and a section of the Pentagon. Since 11 September, my Government has obtained clear and compelling information that the AlQaeda organization, which is supported by the Taliban regime in Afghanistan, had a central role in the attacks. There is still much we do not know. Our inquiry is in its early stages. We may find that our self-defence requires further actions with respect to other organizations and other States.

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation. Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan. In carrying out these actions, the United States is committed to minimizing civilian casualties and damage to civilian property. In addition, the United States will continue its humanitarian efforts to alleviate the suffering of the people of Afghanistan. We are providing them with food, medicine and supplies.

I ask that you circulate the text of the present letter as a document of the Security Council.

## **5. Report to Congress**

On October 9, 2001, the President sent a letter, set forth below, to the Speaker of the House of Representatives and the President Pro Tempore of the Senate concerning the military action.

The letter is available at [www.whitehouse.gov/news/releases/2001/10/20011009-6.html](http://www.whitehouse.gov/news/releases/2001/10/20011009-6.html).

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At approximately 12:30 p.m. (EDT) on October 7, 2001, on my orders, U.S. Armed Forces began combat action in Afghanistan against Al Qaida terrorists and their Taliban supporters. This military action is a part of our campaign against terrorism and is designed to disrupt the use of Afghanistan as a terrorist base of operations.

We are responding to the brutal September 11 attacks on our territory, our citizens, and our way of life, and to the continuing threat of terrorist acts against the United States and our friends and allies. This follows the deployment of various combat-equipped and combat support forces to a number of locations in the Central and Pacific Command areas of operations, as I reported to the Congress on September 24, to prepare for the campaign to prevent and deter terrorism.

I have taken these actions pursuant to my constitutional authority to conduct U.S. foreign relations as Commander in Chief and Chief Executive. It is not possible to know at this time either the duration of combat operations or the scope and duration of the deployment of U.S. Armed Forces necessary to counter the terrorist threat to the United States. As I have stated previously, it is likely that the American campaign against terrorism will be lengthy. I will direct such additional measures as necessary in exercise of our right to self-defense and to protect U.S. citizens and interests.

I am providing this report as part of my efforts to keep the Congress informed, consistent with the War Powers Resolution and Public Law 107-40. Officials of my Administration and I have been communicating regularly with the leadership and other members of Congress, and we will continue to do so. I appreciate the continuing support of the Congress, including its enactment of

Public Law 107-40, in these actions to protect the security of the United States of America and its citizens, civilian and military, here and abroad.

## **6. Military Commissions**

### ***a. Military Order***

On November 13, 2001, President Bush issued a “Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” 66 Fed. Reg. 57833 (November 16, 2001). The military order provides for the potential use of military tribunals for trial of a non-U.S. citizen whom the President determines there is reason to believe is or was a member of al Qaeda, or has participated in terrorist acts against the United States, or has harbored such individuals and finds that it is in the interest of the United States that such individual be subject to the order. The text of the order is set forth below.

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By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

### **Section 1. Findings.**

- (a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.
- (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in



the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

- (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
- (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.
- (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.
- (f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.
- (g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

**Sec. 2. Definition and Policy.**

- (a) The term “individual subject to this order” shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:
  - (1) there is reason to believe that such individual, at the relevant times,
    - (i) is or was a member of the organization known as al Qaida;
    - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or
    - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and
  - (2) it is in the interest of the United States that such individual be subject to this order.
- (b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.
- (c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

**Sec. 3. Detention Authority of the Secretary of Defense.**  
**Any individual subject to this order shall be—**

- (a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

- (b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;
- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

**Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.**

- (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.
- (b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.
- (c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—
  - (1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;
  - (2) a full and fair trial, with the military commission sitting as the triers of both fact and law;
  - (3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the

time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

- (4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;
- (5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;
- (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
- (7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
- (8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

#### **Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.**

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

#### **Sec. 6. Additional Authorities of the Secretary of Defense.**

- (a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regu-

lations as may be necessary to carry out any of the provisions of this order.

- (b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

## **Sec. 7. Relationship to Other Law and Forums.**

- (a) Nothing in this order shall be construed to—
  - (1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
  - (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
  - (3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.
- (b) With respect to any individual subject to this order—
  - (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
  - (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.
- (c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.
- (d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.
- (e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such

governmental authority to prosecute any individual for whom control is transferred.

## **Sec. 8. Publication.**

This order shall be published in the Federal Register.

### ***b. Explanation of military commissions***

Alberto R. Gonzales, counsel to President Bush, described the Military Order in a letter to the New York Times of November 30, 2001, set forth below.

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## **Martial Justice, Full and Fair**

Like Presidents before him, President Bush has invoked his power to establish military commissions to try enemy belligerents who commit war crimes. In appropriate circumstances, these commissions provide important advantages over civilian trials. They spare American jurors, judges and courts the grave risks associated with terrorist trials. They allow the government to use classified information as evidence without compromising intelligence or military efforts. They can dispense justice swiftly, close to where our forces may be fighting, without years of pretrial proceedings or post-trial appeals.

And they can consider the broadest range of relevant evidence to reach their verdicts. For example, circumstances in a war zone often make it impossible to meet the authentication requirements for documents in a civilian court, yet documents from Al Qaeda safe houses in Kabul might be essential to accurately determine the guilt of Qaeda cell members hiding in the West. Some in Congress and some civil libertarians remain skeptical of the military commissions. Their criticism, while well-intentioned, is wrong and is based on misconceptions about what the President's order does and how it will function.

The order covers only foreign enemy war criminals; it does not cover United States citizens or even enemy soldiers abiding by the laws of war. Under the order, the President will refer to

military commissions only noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States. The President must determine that it would be in the interests of the United States that these people be tried by military commission, and they must be chargeable with offenses against the international laws of war, like targeting civilians or hiding in civilian populations and refusing to bear arms openly. Enemy war criminals are not entitled to the same procedural protections as people who violate our domestic laws.

Military commission trials are not secret. The President's order authorizes the Secretary of Defense to close proceedings to protect classified information. It does not require that any trial, or even portions of a trial, be conducted in secret. Trials before military commissions will be as open as possible, consistent with the urgent needs of national security. The specter of mass secret trials, as depicted by critics, is not an accurate reflection of the order or the President's intent.

The order specifically directs that all trials before military commissions will be "full and fair." Everyone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense. The American military justice system is the finest in the world, with longstanding traditions of forbidding command influence on proceedings, of providing zealous advocacy by competent defense counsel, and of procedural fairness. Military commissions employed during World War II even acquitted some German and Japanese defendants. The suggestion that these commissions will afford only sham justice like that dispensed in dictatorial nations is an insult to our military justice system.

The order preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court. The language of the order is similar to the language of a military tribunal order issued by President Franklin Roosevelt that was construed by the Supreme Court to permit habeas corpus review.

Military commissions are consistent with American historical and constitutional traditions. Confederate agents disguised as

civilians traveling to New York to set it afire were tried by military commission. Nazi saboteurs who came ashore on Long Island during World War II disguised as civilians and intending to attack American war industries were tried before military commissions. The use of such commissions has been consistently upheld by the Supreme Court.

Military commissions do not undermine the constitutional values of civil liberties or separation of powers; they protect them by ensuring that the United States may wage war against external enemies and defeat them. To defend the nation, President Bush has rightly sought to employ every lawful means at his disposal. Military commissions are one such means, and their judicious use will help keep Americans safe and free.

**c. *Response to OSCE inquiry***

On November 22, 2001, the United States received a request for information from the Organization for Security and Cooperation in Europe ("OSCE") about the national emergency declared by the United States and whether the United States had derogated from the International Covenant on Civil and Political Rights and its commitments to the Copenhagen Document (1990) and the Moscow Document (1991). Paragraphs 24 and 25 of the Copenhagen Document (Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 5–July 29, 1990, available at [www.osce.org/docs/english/1990-1999/hd/cope90e.htm](http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm)) and paragraph 28 of the Moscow Document (Document on the Moscow Meeting of the Conference on the Human Dimension of the CSCE, September 10–October 15, 1991, available at <http://www.osce.org/docs/english/1990-1999/hd/mosc91e.htm>), address limitations on derogations from obligations relating to human rights and fundamental freedoms during a state of public emergency. The United States responded in a letter of December 1, 2001 set forth below in full.

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This is in response to your November 22 letter in which you requested information concerning a national emergency declared



by the United States, certain political commitments made by the OSCE Participating States in the Copenhagen Document (1990) and the Moscow Document (1991) and any derogation from the International Covenant on Civil and Political Rights (ICCPR).

The President of the United States has issued a number of executive orders since the September 11 terrorist attacks that declare a national emergency as a result of those attacks, including the November 13 Military Order about which you have inquired. Under U.S. law, declarations of national emergency have been used frequently, in both times of war and times of peace, in order to implement special legal authorities, such as calling up military reserve units or blocking certain financial transactions.

In regard to the Moscow Document, the Copenhagen Document, and the ICCPR, the United States has not derogated from its commitments and remains dedicated to protecting human rights and fundamental freedoms in these difficult times. The Military Order in question makes clear that anyone tried by a military commission shall be given a full and fair trial. The rules and regulations for the conduct of any such proceedings have not yet been issued. The United States will respect its commitments under international law in any implementation of the order.

## **C. NON-MILITARY RESPONSES BY THE UNITED STATES**

After the attacks of September 11, 2001, the United States took steps both domestically and internationally to combat terrorism not involving military action.

### **1. Freezing of Terrorists' Assets**

#### **a. Executive Order 13224**

President George W. Bush issued Executive Order 13224 on September 23, 2001, pursuant to his authority under the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. § 1703(b), set forth below. 66 Fed. Reg. 49079 (September 25, 2001). The Order imposed economic sanctions on persons (defined as including individuals or enti-

ties) who commit, threaten to commit, or support certain acts of terrorism. An annex to the Order identified 12 individuals and 15 entities whose property and interests in property are blocked pursuant to the Order.

The Order also blocked the property and interests in property of persons designated by the Secretary of State, in consultation with the Secretary of the Treasury and Attorney General, as committing, or posing a significant risk of committing, acts of terrorism threatening the security of U.S. nationals or U.S. national security, foreign policy, or economy. In addition, it blocked the property and interests in property of persons designated by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, *inter alia*, as providing support or services to, or being associated with, certain individuals or entities designated under the Order. The Secretary of the Treasury may also block property and interests in property of persons determined to be owned or controlled by, or to act for or on behalf of, persons designated in or under the Order. Any transaction or dealing by U.S. persons or within the U.S. in property and interests in property blocked pursuant to the Order is prohibited.

The property and interests in property of an additional 33 individuals and 6 entities were blocked, effective October 12, 2001, pursuant to determinations by the Secretary of State and the Secretary of the Treasury. *See* 66 Fed. Reg. 54404 (Oct. 26, 2001). Additional designations were made by the Secretary of State on October 31, December 18 and December 31, 2001. *See* 67 Fed. Reg. 12633 (Mar. 19, 2002). The Secretary of the Treasury made additional designations on November 7, December 4, and December 20, 2001. *See* 67 Fed. Reg. 12644 (Mar. 19, 2002).

Sanctions already in place against the Taliban at the time Executive Order 13224 was issued are discussed in 15.B. *supra*.

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**EXECUTIVE ORDER 13224—BLOCKING PROPERTY  
AND PROHIBITING TRANSACTIONS WITH PERSONS  
WHO COMMIT, THREATEN TO COMMIT, OR SUPPORT  
TERRORISM**

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)(IEEPA), the National Emergencies Act (50 U.S.C. 1601 et seq.), section 5 of the United Nations Participation Act of 1945, as amended (22 U.S.C. 287c) (UNPA), and section 301 of title 3, United States Code, and in view of United Nations Security Council Resolution (UNSCR) 1214 of December 8, 1998, UNSCR 1267 of October 15, 1999, UNSCR 1333 of December 19, 2000, and the multilateral sanctions contained therein, and UNSCR 1363 of July 30, 2001, establishing a mechanism to monitor the implementation of UNSCR 1333,

I, GEORGE W. BUSH, President of the United States of America, find that grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the terrorist attacks in New York, Pennsylvania, and the Pentagon committed on September 11, 2001, acts recognized and condemned in UNSCR 1368 of September 12, 2001, and UNSCR 1269 of October 19, 1999, and the continuing and immediate threat of further attacks on United States nationals or the United States constitute an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States, and in furtherance of my proclamation of September 14, 2001, Declaration of National Emergency by Reason of Certain Terrorist Attacks, hereby declare a national emergency to deal with that threat. I also find that because of the pervasiveness and expansiveness of the financial foundation of foreign terrorists, financial sanctions may be appropriate for those foreign persons that support or otherwise associate with these foreign terrorists. I also find that a need exists for further consultation and cooperation with, and sharing of information by, United States and foreign financial institutions as an additional tool to enable the United States to combat the financing of terrorism.

I hereby order: Section 1. Except to the extent required by section 203(b) of IEEPA (50 U.S.C. 1702(b)), or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date of this order, all property and interests in property of the following persons that are in the United States or that hereafter come within the United States, or that hereafter come within the possession or control of United States persons are blocked:

- (a) foreign persons listed in the Annex to this order;
- (b) foreign persons determined by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, to have committed, or to pose a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States;
- (c) persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to be owned or controlled by, or to act for or on behalf of those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order;
- (d) except as provided in section 5 of this order and after such consultation, if any, with foreign authorities as the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, deems appropriate in the exercise of his discretion, persons determined by the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General;
  - (i) to assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of, such acts of terrorism or those persons listed in the Annex to this order or determined to be subject to this order; or
  - (ii) to be otherwise associated with those persons listed in the Annex to this order or those persons determined to be subject to subsection 1(b), 1(c), or 1(d)(i) of this order.

Sec. 2. Except to the extent required by section 203(b) of IEEPA (50 U.S.C. 1702(b)), or provided in regulations, orders, directives, or licenses that may be issued pursuant to this order, and notwithstanding any contract entered into or any license or permit granted prior to the effective date:

- (a) any transaction or dealing by United States persons or within the United States in property or interests in property blocked pursuant to this order is prohibited, including but not limited to the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed in the Annex to this order or determined to be subject to this order;
- (b) any transaction by any United States person or within the United States that evades or avoids, or has the purpose of evading or avoiding, or attempts to violate, any of the prohibitions set forth in this order is prohibited; and
- (c) any conspiracy formed to violate any of the prohibitions set forth in this order is prohibited.

Sec. 3. For purposes of this order:

- (a) the term “person” means an individual or entity;
- (b) the term “entity” means a partnership, association, corporation, or other organization, group, or subgroup;
- (c) the term “United States person” means any United States citizen, permanent resident alien, entity organized under the laws of the United States (including foreign branches), or any person in the United States; and
- (d) the term “terrorism” means an activity that—
  - (i) involves a violent act or an act dangerous to human life, property, or infrastructure; and
  - (ii) appears to be intended—(A) to intimidate or coerce a civilian population; (B) to influence the policy of a government by intimidation or coercion; or (C) to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking.

Sec. 4. I hereby determine that the making of donations of the type specified in section 203(b)(2) of IEEPA (50 U.S.C. 1702(b)(2)) by United States persons to persons determined to be subject to

this order would seriously impair my ability to deal with the national emergency declared in this order, and would endanger Armed Forces of the United States that are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances, and hereby prohibit such donations as provided by section 1 of this order. Furthermore, I hereby determine that the Trade Sanctions Reform and Export Enhancement Act of 2000 (Title IX, Public Law 106-387) shall not affect the imposition or the continuation of the imposition of any unilateral agricultural sanction or unilateral medical sanction on any person determined to be subject to this order because imminent involvement of the Armed Forces of the United States in hostilities is clearly indicated by the circumstances.

Sec. 5. With respect to those persons designated pursuant to subsection 1(d) of this order, the Secretary of the Treasury, in the exercise of his discretion and in consultation with the Secretary of State and the Attorney General, may take such other actions than the complete blocking of property or interests in property as the President is authorized to take under IEEPA and UNPA if the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, deems such other actions to be consistent with the national interests of the United States, considering such factors as he deems appropriate.

Sec. 6. The Secretary of State, the Secretary of the Treasury, and other appropriate agencies shall make all relevant efforts to cooperate and coordinate with other countries, including through technical assistance, as well as bilateral and multilateral agreements and arrangements, to achieve the objectives of this order, including the prevention and suppression of acts of terrorism, the denial of financing and financial services to terrorists and terrorist organizations, and the sharing of intelligence about funding activities in support of terrorism.

Sec. 7. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, is hereby authorized to take such actions, including the promulgation of rules and regulations, and to employ all powers granted to the President by IEEPA and UNPA as may be necessary to carry out the purposes of this order. The Secretary of the Treasury may redelegate any of these functions to other officers and agencies of the United

States Government. All agencies of the United States Government are hereby directed to take all appropriate measures within their authority to carry out the provisions of this order.

Sec. 8. Nothing in this order is intended to affect the continued effectiveness of any rules, regulations, orders, licenses, or other forms of administrative action issued, taken, or continued in effect heretofore or hereafter under 31 C.F.R. chapter V, except as expressly terminated, modified, or suspended by or pursuant to this order.

Sec. 9. Nothing contained in this order is intended to create, nor does it create, any right, benefit, or privilege, substantive or procedural, enforceable at law by a party against the United States, its agencies, officers, employees or any other person.

Sec. 10. For those persons listed in the Annex to this order or determined to be subject to this order who might have a constitutional presence in the United States, I find that because of the ability to transfer funds or assets instantaneously, prior notice to such persons of measures to be taken pursuant to this order would render these measures ineffectual. I therefore determine that for these measures to be effective in addressing the national emergency declared in this order, there need be no prior notice of a listing or determination made pursuant to this order.

Sec. 11. (a) This order is effective at 12:01 a.m. eastern daylight time on September 24, 2001.

(b) This order shall be transmitted to the Congress and published in the Federal Register.

#### ***b. Remarks by President Bush***

On signing Executive Order 13224, the President made the following comments.

The full text of remarks by the President, the Secretary of the Treasury and the Secretary of State is available at [www.whitehouse.gov/news/releases/2001/09/20010924-4.html](http://www.whitehouse.gov/news/releases/2001/09/20010924-4.html).

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THE PRESIDENT: Good morning. At 12:01 a.m. this morning, a major thrust of our war on terrorism began with the stroke of

a pen. Today, we have launched a strike on the financial foundation of the global terror network.

\* \* \* \*

I've signed an executive order that immediately freezes United States financial assets of and prohibits United States transactions with 27 different entities. They include terrorist organizations, individual terrorist leaders, a corporation that serves as a front for terrorism, and several nonprofit organizations.

Just to show you how insidious these terrorists are, they often-times use nice-sounding, non-governmental organizations as fronts for their activities. We have targeted three such NGOs. We intend to deal with them, just like we intend to deal with others who aid and abet terrorist organizations. This executive order means that United States banks that have assets of these groups or individuals must freeze their accounts. And United States citizens or businesses are prohibited from doing business with them.

We know that many of these individuals and groups operate primarily overseas, and they don't have much money in the United States. So we've developed a strategy to deal with that. We're putting banks and financial institutions around the world on notice, we will work with their governments, ask them to freeze or block terrorists' ability to access funds in foreign accounts. If they fail to help us by sharing information or freezing accounts, the Department of the Treasury now has the authority to freeze their banks' assets and transactions in the United States.

We have developed the international financial equivalent of law enforcement's "Most Wanted" list. And it puts the financial world on notice. If you do business with terrorists, if you support or sponsor them, you will not do business with the United States of America.

I want to assure the world that we will exercise this power responsibly. But make no mistake about it, we intend to, and we will, disrupt terrorist networks. I want to assure the American people that in taking this action and publishing this list, we're acting based on clear evidence, much of which is classified, so it will not be disclosed. It's important as this war progresses that the American people understand we make decisions based upon classified information, and we will not jeopardize the sources; we



will not make the war more difficult to win by publicly disclosing classified information.

\* \* \* \*

***c. Transmittal of Executive Order 13224 to Congress***

The President formally reported his action in issuing Executive Order 13224 to Congress, describing the effect of the Order in greater detail, as set forth below.

The full text is available at [www.whitehouse.gov/news/releases/2001/05/20010523-10.html](http://www.whitehouse.gov/news/releases/2001/05/20010523-10.html).

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**To the Congress of the United States**

Pursuant to section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(b) (IEEPA), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my statutory authority to declare a national emergency in response to the unusual and extraordinary threat posed to the national security, foreign policy, and economy of the United States by grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001, terrorist attacks at the World Trade Center, New York, at the Pentagon, and in Pennsylvania. I have also issued an Executive Order to help deal with this threat by giving the United States more powerful tools to reach the means by which terrorists and terrorist networks finance themselves and to encourage greater cooperation by foreign financial institutions and other entities that may have access to foreign property belonging to terrorists or terrorist organizations.

The attacks of September 11, 2001, highlighted in the most tragic way the threat posed to the security and national interests of the United States by terrorists who have abandoned any regard for humanity, decency, morality, or honor. Terrorists and terrorist networks operate across international borders and derive their financing from sources in many nations. Often, terrorist property and financial assets lie outside the jurisdiction of the United States. Our effort to combat and destroy the financial underpinnings of

global terrorism must therefore be broad, and not only provide powerful sanctions against the U.S. property of terrorists and their supporters, but also encourage multilateral cooperation in identifying and freezing property and assets located elsewhere.

This Executive Order is part of our national commitment to lead the international effort to bring a halt to the evil of terrorist activity. In general terms, it provides additional means by which to disrupt the financial support network for terrorist organizations by blocking the U.S. assets not only of foreign persons or entities who commit or pose a significant risk of committing acts of terrorism, but also by blocking the assets of their subsidiaries, front organizations, agents, and associates, and any other entities that provide services or assistance to them. Although the blocking powers enumerated in the order are broad, my Administration is committed to exercising them responsibly, with due regard for the culpability of the persons and entities potentially covered by the order, and in consultation with other countries.

The specific terms of the Executive Order provide for the blocking of the property and interests in property, including bank deposits, of foreign persons designated in the order or pursuant thereto, when such property is within the United States or in the possession or control of United States persons. In addition, the Executive Order prohibits any transaction or dealing by United States persons in such property or interests in property, including the making or receiving of any contribution of funds, goods, or services to or for the benefit of such designated persons.

I have identified in an Annex to this order eleven terrorist organizations, twelve individual terrorist leaders, three charitable or humanitarian organizations that operate as fronts for terrorist financing and support, and one business entity that operates as a front for terrorist financing and support. I have determined that each of these organizations and individuals have committed, supported, or threatened acts of terrorism that imperil the security of U.S. nationals or the national security, foreign policy, or economy of the United States. I have also authorized the Secretary of State to determine and designate additional foreign persons who have committed or pose a significant risk of committing acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Such designations are to be made in consultation with the Secretary of the Treasury and the Attorney General.

The Executive Order further authorizes the Secretary of the Treasury to identify, in consultation with the Secretary of State and the Attorney General, additional persons or entities that:

- Are owned or controlled by, or that act for or on behalf of, those persons designated in or pursuant to the order;
- Assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of acts of terrorism or those persons designated in or pursuant to the order; or
- Are otherwise associated with those persons designated in or pursuant to the order.

Prior to designating persons that fall within the latter two categories, the Secretary of the Treasury is authorized to consult with any foreign authorities the Secretary of State deems appropriate, in consultation with the Secretary of the Treasury and the Attorney General. Such consultation is intended to avoid the need for additional designations by securing bilateral or multilateral cooperation from foreign governments and foreign financial and other institutions. Such consultation may include requests to foreign governments to seek, in accordance with international law and their domestic laws, information from financial institutions regarding terrorist property and to take action to deny terrorists the use of such property. The order also provides broad authority, with respect to the latter two categories, for the Secretary of the Treasury, in his discretion, and in consultation with the Secretary of State and the Attorney General, to take lesser action than the complete blocking of property or interests in property if such lesser action is deemed consistent with the national interests of the United States. Some of the factors that may be considered in deciding whether a lesser action against a foreign person is consistent with the national interests of the United States include:

- The impact of blocking on the U.S. or international financial system;
- The extent to which the foreign person has cooperated with U.S. authorities;

- The degree of knowledge the foreign person had of the terrorist-related activities of the designated person;
- The extent of the relationship between the foreign person and the designated person; and
- The impact of blocking or other measures on the foreign person.

The Executive Order also directs the Secretary of State, the Secretary of the Treasury, and other agencies to make all relevant efforts to cooperate and coordinate with other countries, including through existing and future multilateral and bilateral agreements and arrangements, to achieve the objectives of this order, including the prevention and suppression of acts of terrorism, the denial of the financing of and financial services to terrorists and terrorist organizations, and the sharing of intelligence about funding activities in support of terrorism.

In the Executive Order, I also have made determinations to suspend otherwise applicable exemptions for certain humanitarian, medical, or agricultural transfers or donations. Regrettably, international terrorist networks make frequent use of charitable or humanitarian organizations to obtain clandestine financial and other support for their activities. If these exemptions were not suspended, the provision of humanitarian materials could be used as a loophole through which support could be provided to individuals or groups involved with terrorism and whose activities endanger the safety of United States nationals, both here and abroad.

The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, is authorized to issue regulations in exercise of my authorities under IEEPA to implement the prohibitions set forth in the Executive Order. All Federal agencies are also directed to take actions within their authority to carry out the provisions of the order, and, where applicable, to advise the Secretary of the Treasury in a timely manner of the measures taken.

The measures taken here will immediately demonstrate our resolve to bring new strength to bear in our multifaceted struggle to eradicate international terrorism. It is my hope that they will point the way for other civilized nations to adopt similar measures to attack the financial roots of global terrorist networks.

In that regard, this Executive Order is an integral part of our larger effort to form a coalition in the global war against terrorism. We have already worked with nations around the globe and groups such as the G-8, the European Union, and the Rio Group, all of which have issued strong statements of their intention to take measures to limit the ability of terrorist groups to operate. In the next several weeks the 33rd Session of the International Civil Aviation Organization (ICAO) General Assembly and other fora will focus on terrorism worldwide. It is our intention to work within the G-7/G-8, the ICAO, and other fora to reach agreement on strong concrete steps that will limit the ability of terrorists to operate. In the G-7/G-8, the United States will work with its partners, drawing on the G-8 Lyon Group on Transnational Crime, the G-8 Group on Counter-terrorism, the G-7 Financial Action Task Force, and the existing G-8 commitments to build momentum and practical cooperation in the fight to stop the flow of resources to support terrorism. In addition, both the Convention for the Suppression of the Financing of Terrorism and the Convention for the Suppression of Terrorist Bombings have been forwarded to the Senate, and I will be forwarding shortly to the Congress implementing legislation for both Conventions.

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## **2. UN Security Council Resolution 1373 and U.S. Report**

The United States sponsored UN Security Council Resolution 1373, which was unanimously adopted under Chapter VII of the Charter of the United Nations on September 28, 2001. U.N. Doc. S/Res/1373 (2001), noted *supra* in A.2. This resolution established a body of legally binding counterterrorism obligations on all UN members. It decided that all UN members shall refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts, take necessary steps to prevent terrorist acts, and deny safe haven for those committing or otherwise supporting terrorist acts and bring terrorists to justice. Among other things, it required all states to criminalize the provision of funds to terrorists and to freeze without delay the funds and other financial assets and economic resources of terrorists and

supporters of terrorism. The full text of UNSCR 1373 is available at [www.un.org/Docs/scres/2001/res1373e.pdf](http://www.un.org/Docs/scres/2001/res1373e.pdf).

On December 19, 2001, in accordance with operative paragraph 6 of Resolution 1373, the United States filed its report with the Counter-Terrorism Committee of the Security Council, established pursuant to the same paragraph. The Report provides an overview of steps taken as of the date of the Report to implement Resolution 1373, and responds to each element of operative paragraphs 1, 2 and 3 of the Resolution. UN Doc. S/2001/1220 (2001). Excerpts below provide a summary of U.S. actions and address issues of relevant criminal offenses and penalties in the U.S., means of denying safe haven to terrorists, cooperation with other states, border controls, implementation of relevant conventions and other international instruments, screening asylum seekers and preventing the abuse of refugee status by terrorists.

The full text of the Report is available at [www.un.org/Docs/sc/committees/1373/](http://www.un.org/Docs/sc/committees/1373/) under Documents.

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## INTRODUCTION AND SUMMARY

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Full implementation of resolution 1373 will require each UN member state to take specific measures to combat terrorism. Most states will have to make changes in their laws, regulations, and practices. Those with the capacity to assist in these changes will be needed to help those who lack the expertise and resources to achieve full implementation. As this report that follows makes clear, the United States is ready to provide technical assistance to help in these efforts. We will work closely with other nations who also have the capacity to assist, and with those seeking assistance. Cooperation is key to success.

It will be especially important that these efforts be sustained in the coming months and years. The goal should be to ensure through the UN that enduring mechanisms are created, and that existing institutions are utilized, to raise the capabilities of all nations to confront the threat of terrorism. As UNSCR 1373 rec-

ognizes, there will be a need for enhanced coordination of efforts on national, subregional, regional and global levels.

The United States is waging a broad-ranging campaign both at home and abroad against terrorism, including by taking military action in Afghanistan. As another way of combating terrorism internationally, the United States strongly supports UNSCR 1373 and the Counter Terrorist Committee set up by the resolution, and wishes to see full implementation by all states. As President Bush has promised: “We will direct every resource at our command—every means of diplomacy, every tool of intelligence, every instrument of law enforcement, every financial influence, and every necessary weapon of war—to the disruption and to the defeat of the global terror network.”

Our report details only some of the many steps that we have been taking to combat terrorism and comply with UNSCR 1373. But, we intend to do even more to ensure that we have taken all appropriate measures. The following is a list of some of the steps taken, which are detailed in this report.

### **Steps taken by the U.S.**

- On September 23, Executive Order (E.O.) 13224, froze all the assets of 27 foreign individuals, groups, and entities linked to terrorist acts or supporting terrorism and authorized the freezing of assets of those who commit, or pose a significant threat of committing, acts of terrorism.
- On September 28, the U.S. sponsored the UN Security Council Resolution 1373, calling on all UN members to criminalize the provision of funds to all terrorists, effectively denying terrorists safe financial haven anywhere.
- On October 5, the Secretary of State, in consultation with the Attorney General and the Secretary of the Treasury, redesignated 25 terrorist organizations (including al-Qaeda) as foreign terrorist organizations pursuant to the Antiterrorism and Effective Death Penalty Act of 1996. Giving material support or resources to any of these foreign organizations is a felony under U.S. law.

- On October 12, the U.S. added 39 names to the list of individuals and organizations linked to terrorism or terrorist financing under E.O. 13224.
- On October 26, the U.S. enacted the USA PATRIOT Act, which significantly expanded the ability of U.S. law enforcement to investigate and prosecute persons who engage in terrorist acts.
- On October 29, the U.S. created a Foreign Terrorist Tracking Task Force aimed at denying entry into the U.S. of persons suspected of being terrorists and locating, detaining, prosecuting and deporting terrorists already in the U.S.
- On November 2, the U.S. designated 22 terrorist organizations located throughout the world under E.O. 13224, thus highlighting the need to focus on terrorist organizations worldwide.
- On November 7, the U.S. added 62 new organizations and individuals, all of whom were either linked to the Al Barakaat conglomerate or the Al Taqwa Bank, which have been identified as supplying funds to terrorists.
- On December 4, the U.S. froze under E.O. 13224 the assets and accounts of the Holy Land Foundation in Richardson, Texas, whose funds are used to support the Hamas terrorist organization, and two other entities, bringing the total to 153.
- On December 5, the Secretary of State designated 39 groups as “terrorist organizations” under the Immigration and Nationality Act, as amended by the new USA PATRIOT Act, in order to strengthen the United States’ ability to exclude supporters of terrorism or to deport them if they are found within our borders. We call the list of such designated organizations the “Terrorist Exclusion List.”
- The U.S. has signed and expects to ratify in the near future the UN Convention for the Suppression of the Financing of Terrorism and the UN Convention for the Suppression of Terrorist Bombings.
- The U.S. has met with numerous multilateral groups and regional organizations to accelerate the exchange of operational information laid out in UNSCR 1373.
- The U.S. has stepped up bilateral information exchanges through law enforcement and intelligence channels to prevent terrorist acts and to investigate and prosecute the perpetrators of terrorist acts.



- Our Federal Bureau of Investigation has created an inter-agency Financial Investigation Group to examine the financial arrangements used to support terrorist attacks. The FBI headquarters houses this group, which includes analysts and investigators from numerous federal agencies and federal prosecutors with backgrounds in investigating and prosecuting financial crimes.
- The U.S. brought to conclusion the prosecution of four al-Qaeda members for the bombing of U.S. embassies in Dar es Salaam and Nairobi.
- We have designed a new tamper-resistant U.S. visa, and we have upgraded passports to prevent photo substitution.
- We have intensified border discussions with Canada and Mexico to improve border security.

### UNSCR 1373 Operative Paragraph 1

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#### 1(b): What are the offences and penalties in your country with respect to the activities listed in this sub-paragraph?

There are several sources of legal authority for the U.S. government to rely upon in imposing civil and criminal penalties for the provision and collection of funds to provide support to terrorists. These include both laws prohibiting material or other support to terrorists and their supporters, and money laundering laws addressing a variety of criminal activity, including the unlawful movement of money without proper reports.

#### *Providing Support to Terrorism*

- Providing “material support” to terrorists or terrorist organizations has been prohibited as a crime since the enactment of the Antiterrorism and Effective Death Penalty Act of 1996. As a result of the October 26, 2001 enactment of the antiterrorism bill known as the “USA PATRIOT Act,” there is now specific authority to forfeit terrorist assets as well, thus providing a direct means to deprive terrorists of their funds.

- U.S. law makes it a crime to provide material support or resources within the U.S. to a person intending that the support or resources will be used, or is in preparation for, the commission of a wide variety of specified terrorism-related crimes.<sup>4</sup> “Material support or resources” is very broadly defined and means “currency or other financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”<sup>5</sup>
- Property provided as “material support” to a terrorist in violation of 18 U.S.C. § 2339A is subject to forfeiture if it is involved in a transaction or attempted transaction in violation of 18 U.S.C. § 1956–57, or if it is the proceeds of a section 2339A offense.<sup>6</sup>
- In addition, U.S. law<sup>7</sup> prohibits the provision of “material support” to a Foreign Terrorist Organization.<sup>8</sup> A Foreign Terrorist Organization (FTO) may be designated pursuant to section 219 of the Immigration and Nationality Act.<sup>9</sup> Al-Qaida has been designated as an FTO. When a financial institution becomes aware that it has possession of, or control over, any funds in which a Foreign Terrorist Organization, or its agent, has an interest, it shall retain possession or control over the funds, and report the existence of such funds to the Secretary of the Treasury. Failure to do so may result in civil penalties.
- Finally, providing prohibited “material support” is punishable criminally by 15 years imprisonment and/or a fine of up to \$250,000 for individuals and \$500,000 for organizations.

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<sup>4</sup> 18 U.S.C. § 2339A

<sup>5</sup> 18 U.S.C. § 2339A

<sup>6</sup> 18 U.S.C. § 981(a)(1)(A) would authorize forfeiture for the transaction offense, and 18 U.S.C. § 981(a)(1)(C) would authorize forfeiture for the proceeds offense.

<sup>7</sup> 18 U.S.C. § 2339B

<sup>8</sup> 12 U.S.C. § 2339B

<sup>9</sup> 8 U.S.C. § 1189

### *Money Laundering and Currency Reporting*

- Property brought into or taken out of the United States with the intent to promote one of the terrorist acts or other crimes constituting a Specified Unlawful Activity is subject to civil forfeiture.<sup>10</sup> For example, if U.S. Customs agents learned during an investigation that funds raised in the U.S. were sent, or were attempted to be sent, abroad to fund a terrorist action, or funds came into the United States for such a purpose, the funds would be forfeitable.
- Currency and other monetary instruments, including a deposit in a financial institution traceable to those instruments, may be forfeited<sup>11</sup> when a required Currency Monetary Instrument Report has not been filed properly. Pursuant to the USA PATRIOT Act, there is now specific authority to forfeit currency and other monetary instruments if someone “knowingly conceals” those instruments to evade a reporting requirement.<sup>12</sup> The U.S. plans to pursue that authority fully.
- Any person who violates any license, order, or regulation issued pursuant to the International Emergency Economic Powers Act (IEEPA), *i.e.*, the authority under which the President issued Executive Orders 13224 and 12947, may be subject to civil fines, and those who willfully violate, or willfully attempt to violate, any license, order or regulation issued pursuant to IEEPA may be subject to criminal penalties including fines or imprisonment.

### **UNSCR 1373 Operative Paragraph 2**

**2(a): What legislation or other measures are in place to give effect to this sub-paragraph? In particular, what offences in your country prohibit (i) recruitment to terrorist groups and (ii) the supply of weapons to terrorists? What other measures help prevent such activities?**

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<sup>10</sup> 18 U.S.C. § 981(a)(1)(A) (as property involved in a violation of 18 U.S.C. § 1956(a)(2)(A))

<sup>11</sup> 31 U.S.C. § 5317(e)

<sup>12</sup> 31 U.S.C. § 5332 (the new Bulk Cash Smuggling offense)

### *Recruitment*

Conspiracy and other laws make it illegal to solicit a person to commit a terrorist act or other crime.<sup>16</sup> Recruiting for membership in a terrorist organization is grounds for denying a visa.<sup>17</sup> A foreign national who enters the United States and is later found in violation of these prohibitions is subject to deportation.

### *Weapons*

- U.S. law contains criminal prohibitions on the acquisition, transfer and exportation of certain firearms.<sup>18</sup> Numerous state and local laws also apply.
- The U.S. Government also requires licenses for the export of defense articles (which includes technical data) and defense services pursuant to the Arms Export Control Act (AECA),<sup>19</sup> which counters the illicit transfer of U.S.-origin defense items to any unauthorized person. Violations of the AECA or its implementing regulations can result in civil and criminal penalties.
- It is a crime under U.S. law to provide material support such as funding and weapons for a terrorist act or to an organization designated by the Secretary of State as a foreign terrorist organization.<sup>20</sup> It is also grounds for denying a visa or removing an individual from the U.S.<sup>21</sup>
- The U.S. government also applies controls to exports and re-exports of sensitive U.S.-origin dual-use items and nuclear-related items pursuant to the statutory authorities of the Department of Commerce and the Nuclear Regulatory

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<sup>16</sup> 18 U.S.C. § 373 makes it a criminal offense to solicit a person to commit a violent crime.

<sup>17</sup> § 212(a)(3)(B)(iv)(V) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182

<sup>18</sup> Title 18 of the U.S.C. (Chapter 44—Firearms) 18 U.S.C. §§ 921, et seq.

<sup>19</sup> 22 U.S.C. § 2778 and the International Traffic in Arms Regulations (ITAR)

<sup>20</sup> 18 U.S.C. §§ 2339A, 2339B. Penalties for each violation can include criminal fines and imprisonment of up to fifteen years. As of December 4, 2001, 28 groups are designated as Foreign Terrorist Organizations.

<sup>21</sup> § 212(a)(3)(B)(iv)(V) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1182

Commission. The Department of the Treasury administers and enforces economic sanctions against designated terrorists and those determined to be linked to such terrorists. These sanctions prohibit any transactions or dealings in property or interests in property of terrorism-related entities or individuals, including the exportation or re-exportation of any goods or technology either from the U.S. or by U.S. persons. Violations of these laws or their implementing regulations can result in civil or criminal penalties.

### *Other Measures*

- The U.S. uses a full range of counterterrorism and counterintelligence techniques in preventing terrorist acts, including the use of human and technical sources; aggressive undercover operations; analysis of telephone and financial records; mail; and physical surveillance.
- The intelligence community also tracks terrorist organizations overseas, including attempts to recruit members, and the movement of weapons intended for terrorists and proposed sales to terrorist countries.
- The Customs Service (USCS) exchanges information with companies involved in the manufacture, sale, or export of: munitions or arms, explosive or sensitive materials, restricted communication technologies or equipment, or components of weapons of mass destruction. The USCS meets with industry experts to obtain their assistance in controlling the export of U.S.-origin high technology and munitions items. This partnership between government and industry enhances national security and fosters effective export controls.

**2(b): What other steps are being taken to prevent the commission of terrorist acts, and in particular, what early warning mechanisms exist to allow exchange of information with other states?**

U.S. law enforcement and intelligence agencies have many active and aggressive information sharing programs to prevent terrorist acts. Congress has mandated expansion of international infor-

mation sharing on immigration and law enforcement matters in support of worldwide anti-terrorism efforts. Many nations cooperate actively with the U.S. in fighting terrorism.

- Prior to September 11, the U.S. regularly exchanged information on terrorists and specific indications of threats in other states with their intelligence agencies. Since September 11, we have provided expanding streams of information regarding the responsibility for those terrorist attacks, and information about specific terrorist identities and activities through liaison channels. A principal objective is to share vital anti-terrorist information in as timely and effective a manner as possible.
- With some allied governments we share data through bilateral arrangements on known and suspected terrorists to prevent the issuance of visas and to strengthen border security. Expansion of this program is anticipated. We use this program to preclude visa issuance to terrorists, to warn embassies overseas about certain applicants, to alert intelligence and law enforcement agencies, and to enable immigration and customs officials at ports of entry to detect terrorists who may have obtained visas.
- The Immigration and Naturalization Service (INS) has law enforcement officers stationed abroad who conduct liaison with host government immigration, police and security services. INS also maintains a fulltime presence at INTERPOL, working actively with other federal agents in providing information to police agencies worldwide. INS also has bilateral information-sharing arrangements with certain of its counterpart immigration services.
- The Legal Attaché program of the Federal Bureau of Investigation (FBI) enables it to share information on a broad and timely basis. Direct lines of communication have been established between the U.S. and many countries to coordinate investigative resources worldwide.
- The private sector is included in the dissemination of information of possible terrorist threats, particularly in international financial and technology transfer matters related to terrorist activity.
- The FBI has established a Counterterrorism Division to further enhance the FBI's analysis, information-sharing, and inves-

tigative capabilities. The FBI is publicizing wanted terrorists through various programs including the Top Twenty Terrorist Program.

- The FBI has created an interagency Financial Investigation Group to examine the financial arrangements used to support the terrorist attacks. The FBI headquarters houses this group, which includes analysts and investigators from numerous federal agencies and federal prosecutors with backgrounds in investigating and prosecuting financial crimes.

**2(c): What legislation or procedures exist for denying safe haven to terrorists, such as laws for excluding or expelling the types of individuals referred to in this sub-paragraph?**

Our legislation contains provisions prohibiting admission of foreign nationals who have engaged in terrorist activity. It provides for removal of such persons if they are in the U.S. Also, foreign nationals who are closely associated with or who support terrorist activity can also be denied admission or removed in certain circumstances (e.g. foreign nationals who act as representatives of foreign terrorist organizations or of certain groups that publicly endorse acts of terrorism).

- For immigration purposes, the “terrorist activity” definition includes any unlawful act involving: hijacking; sabotage; detention under threat for the purpose of coercion (of a government or an individual); violent attack on an internationally protected person; assassination; the use of biological, chemical, or nuclear weapons; or the use of explosives, firearms, or any other weapon or dangerous device with the intent to cause harm to individuals or damage to property. The attempt or conspiracy to commit these acts is also included as “terrorist activity.”
- The law defines “engage in terrorist activity” broadly to include committing, inciting, preparing or planning a terrorist activity; gathering target information; soliciting funds or resources for terrorist activity or a terrorist organization; soliciting an individual to engage in terrorist activity or to join a terrorist organization; and affording material support (e.g. a safe house, transportation, communications, funds, funds transfer), false

documentation or identification, weapons, or training for the commission of terrorist activity to a person who has committed terrorist activity, or to a terrorist organization.

- The Department of State and the Immigration and Naturalization Service work together with other agencies to maintain a robust database of terrorists and terrorism supporters, to prevent them from receiving visas or gaining access to the U.S.
- There are additional terrorism-related grounds for denying admission to the U.S. Terrorists are ineligible, for example, for temporary protected status, and asylum and refugee status (see the response in this report to paragraph 3(f) below). There are also provisions in the U.S. Criminal Code, and the Immigration and Nationality Act, to prosecute those who harbor or smuggle alien terrorists, or who provide them with material support (including immigration or other identity documents). In addition, foreign nationals who provide material assistance to, or solicit it for, certain designated terrorist organizations are inadmissible to the United States or may be deported if previously admitted. Thirty-nine Terrorist Exclusion List organizations were designated on December 5, 2001 for this purpose.
- As an example of relevant actions, U.S. immigration authorities have excluded from the U.S. foreign nationals based upon classified information relating to terrorist activity. Some of the cases involved attempted entry with fraudulent passports; others involved immigrants without a valid immigrant visa.

**2(d): What legislation or procedures exist to prevent terrorists acting from your territory against other states or citizens?**

Numerous laws address the threat of terrorists acting from U.S. territory against citizens or interests of other states. Terrorist financing and money laundering laws (see section on paragraph 1 above) are very useful in countering such situations as providing material support or resources. The provision, in the U.S., of material support to a foreign terrorist organization is a serious crime under U.S. law and allows us to take actions which also benefit the anti-terrorist efforts of our overseas partners in the fight against terrorism. Recently, the U.S. has damaged the overseas operations of Mujahadin E-Khalq, the Provisional Irish Republican Army, Hizballah and other foreign terrorist organi-



zations by criminally charging people in the U.S. with providing or attempting to provide material support or resources to those organizations. On December 4, 2001 we shut down a Texas-based fundraising operation whose activities benefited the terrorist activities of Hamas in the Middle East.

- It is a crime to provide, attempt, or conspire to provide within the U.S. material support or resources, or to conceal or disguise the nature, location, source or ownership of resources, knowing or intending that they are to be used in the commission or preparation of a wide variety of specified terrorist related crimes.<sup>22</sup> Material support or resources is very broadly defined and includes, for example, monetary instruments, financial services, lodging, training, documentation, communications, weapons, personnel, transportation, and other physical assets (except medicine or religious materials).
- It is a crime to knowingly provide or attempt or conspire to provide material support or resources to a designated foreign terrorist organization. Again, material support or resources is very broadly defined.<sup>23</sup> U.S. jurisdiction is extraterritorial and the statute specifically contemplates the movement of material support or resources from the U.S. to a foreign terrorist organization outside the U.S.
- Providing or collecting funds for the use of terrorists or terrorist organizations is also a violation of the law.<sup>24</sup> Transactions need not be entirely domestic, but rather can be, and in some cases must be, international to meet the elements of the violation.<sup>25</sup> (See the response to paragraph 1 in this report for details.)

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<sup>22</sup> 18 U.S.C. § 2339A. Penalties for each violation can include criminal fines and incarceration of up to fifteen years.

<sup>23</sup> 18 U.S.C. § 2339B. Penalties for each violation can include criminal fines and incarceration of up to fifteen years.

<sup>24</sup> 18 U.S.C. §§ 1956 and 1957

<sup>25</sup> Penalties for each violation can include enhanced criminal fines and incarceration of up to twenty years. Section 1957 makes it a crime to engage in a monetary transaction in property derived from specified unlawful activity, such as 18 U.S.C. §§ 2339A and/or 2339B. Transactions under § 1957 need not be entirely domestic, but can be, and in some cases must be, international to meet the elements of the violation. Penalties for each violation can include criminal fines and incarceration of up to ten years.

- In addition to the substantial terms of incarceration and the criminal and civil fines imposed for the above violations, the code also authorizes the U.S. to seize and forfeit funds and other assets involved in violations of §§ 1956, 1957, 2339A, and 2339B and funds or assets in which terrorists or terrorist organizations have an interest.<sup>26</sup> The code also includes numerous crimes that may be charged against individuals who act from the U.S. against the citizens of another country or against the interests or facilities of another country, regardless of whether those citizens, facilities or interests are located within the U.S. or within that other country.<sup>27</sup>
- Also, the 50 states each have criminal codes that may enable them to punish people who conspire within their borders to commit serious, terrorist-related crimes beyond the borders of the U.S.

**2(e): What steps have been taken to establish terrorist acts as serious criminal offences and to ensure that the punishment reflects the seriousness of such terrorist acts?**

Terrorist acts are among the most serious offenses under U.S. law. Violent, terrorist-related crimes generally carry substantially higher criminal penalties and can lead to imposition of the death penalty, or life imprisonment.<sup>28</sup>

- Earlier this year, after convicting four members of al-Qaida for the bombing of the U.S. embassies in Nairobi and Dar es

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<sup>26</sup> 18 U.S.C. §§ 981 and 982

<sup>27</sup> For example, 18 U.S.C. § 956 makes it a crime to conspire to kill, maim, or injure persons or damage property in a foreign country; 18 U.S.C. § 2332b makes it a crime to engage in acts of terrorism transcending national boundaries; 18 U.S.C. § 2332a(b) makes it a crime for a national of the United States to use certain weapons of mass destruction outside the United States; 18 U.S.C. § 1116 [makes] the murder or manslaughter of foreign officials, official guests, or internationally protected persons a crime; 18 U.S.C. § 1119 makes a foreign murder of a U.S. national a crime; 18 U.S.C. § 32 makes it a crime to destroy aircraft or aircraft facilities within or outside the U.S.; and finally, 49 U.S.C. §§ 46502–46507 make it a crime to engage in aircraft piracy or carry a weapon or explosive on an aircraft.

<sup>28</sup> E.g. 18 U.S.C. §§ 2332a and 2332b

Salaam, a federal jury in New York City recommended life imprisonment for all four.

- Depending on the defendant's acts, his criminal history, and his willingness to cooperate with authorities, there is a range of sentences from which the sentencing judge may select. In recent years, we have not imposed the death penalty in a federal international terrorism prosecution.
- Terrorist financing statutes carry substantial criminal fines and considerable periods of incarceration.<sup>29</sup> There is only one such case in which a sentence has been imposed. In that case, a U.S.-based individual was assisting immigrants (including at least one affiliated with a foreign terrorist organization) to fraudulently obtain enhanced immigration status. The defendant pled guilty and agreed to cooperate with federal authorities. This defendant received a sentence of two years of incarceration without any possibility of parole and three years of supervision.
- The money laundering statutes also carry considerable penalties.<sup>30</sup> U.S. Sentencing Guidelines provide for substantial enhancement of the prescribed period of incarceration in instances where terrorist activity is involved.

## **2 (f): What procedures and mechanisms are in place to assist other states?**

The U.S. provides assistance for criminal investigations or proceedings relating to terrorist acts through bilateral programs and as an active participant in multilateral programs.

- The U.S. provides training and technical assistance on money laundering and financial investigations to law enforcement, regulatory, and prosecutorial counterparts. The programs ben-

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<sup>29</sup> While the terrorist financing statutes at 18 U.S.C. §§ 2339A and 2339B each authorize imposition of a period of 15 years incarceration for each violation, under the Sentencing Guidelines, a multiple count conviction could result in a sentence of considerably more time than 15 years.

<sup>30</sup> The maximum period of incarceration for a single violation of 18 U.S.C. § 1956 is 20 years. The maximum period of incarceration for a single violation of 18 U.S.C. § 1957 is 10 years.

efit anti-terrorist efforts by assisting other nations' anti-money laundering programs; assisting in creating financial intelligence units; and training financial investigators, bank regulators, and prosecutors to recognize and investigate suspicious transactions.

- The U.S. maintains mutual legal assistance treaties and agreements with over 45 countries, with more in negotiation or signed and awaiting Senate approval. They provide assistance in the investigation, prosecution, and suppression of criminal offenses, including those related to terrorism. For example, such treaties typically obligate the U.S. to provide foreign investigators and prosecutors with financial records, witness statements and testimony, and assistance in freezing and forfeiting criminally derived assets. Even in the absence of a treaty relationship, the U.S. may, under appropriate circumstances, provide a host of evidential assistance to foreign countries pursuant to our domestic law. The U.S. acts on hundreds of foreign requests for assistance in criminal matters every year.
- We assist in training other countries' counterterrorism task forces. Training includes major case management, terrorist crime scene management, advanced kidnapping investigations, and financial underpinnings of terrorism. Also, we make personnel available for assistance on a case-by-case basis. Pertinent information is shared on a regular basis with law enforcement entities around the world.
- The U.S. also maintains overseas International Law Enforcement Academies. Their courses include segments on financial crime and money laundering.

**2(g): How do border controls in your country prevent the movement of terrorists? How do your procedures for issuance of identity papers and travel documents support this? What measures exist to prevent their forgery etc?**

- With few exceptions, all non-U.S. citizens entering the U.S. must have a valid visa or be exempted by holding a passport from one of 29 countries approved for visa waiver. Every visa applicant is subject to a name check through a database containing nearly six million records. At entry, everyone is sub-

ject to inspection. Inspectors are well trained to determine counterfeit and altered documents, and to detect evasive or untruthful responses. Every entering visitor is subject to checks in databases.

- A new, tamper-resistant visa will shortly replace the current visa. We are also working to improve the exchange of data among our agencies to ensure that anyone with a history of involvement with terrorism is quickly identified.
- Because of long common borders, movements to the U.S. from Canada and Mexico are difficult to control. Although cooperation with those governments is good, we are engaged in renewed discussions with both governments to improve border controls.
- American citizens must have a U.S. passport to enter the U.S. unless they have been traveling in North, Central or South America, in which case they may use other documents to verify their citizenship and identity. As we have no national identity card, the INS may rely on several other documents to establish identity and citizenship.
- Applicants for U.S. passports are required to prove their citizenship and identity. Those who fail to meet strict evidentiary requirements are not issued a passport. In addition, a vigorous fraud prevention program trains staff to identify attempts to use valid or falsified documents to obtain a passport in another identity. We can track how many passports one individual has received, and a system is being deployed to better track lost and stolen passports. The U.S. passport itself has recently been upgraded to prevent photographic substitution, the major form of alteration, and to make counterfeiting of the document very difficult. Visas are not issued to known terrorists.
- The Immigration and Naturalization Service also maintains a very proficient Forensic Document Laboratory (FDL), which helps other immigration services to identify fraudulent documents and trends. It routinely prepares "Document Alerts" on new, revised, counterfeit, and altered U.S. and foreign documents. Such alerts have been the basis for both criminal and administrative actions taken against individuals presenting counterfeit or altered documents. The FDL also works very actively to ensure that security marks and checks are embed-

ded in travel and immigration documents, to minimize counterfeiting or alteration.

- The U.S. Border Patrol detects and prevents the smuggling and illegal entry of foreign nationals, primarily between the Ports of Entry. Agents perform their duties along, and in the vicinity of, the 8,000 land and 2,000 coastal miles of U.S. boundaries. In all its enforcement activities, the Border Patrol coordinates with counterterrorism efforts.
- In aviation security, the Federal Aviation Administration has issued a series of security advisories to U.S. and foreign air carriers to enhance passenger and baggage screening requirements, to establish stricter controls on general aviation and tighten the rules on belly cargo in passenger planes. These measures, along with hardening cockpit doors, have upgraded the security of flights to, from and within the U.S.
- Threat assessments by U.S. agencies are continuous and the FAA passes information about terrorists or suspected *mala fide* passengers on a real time basis to airlines. Passengers are subject to multiple checks of their identity and bona fides from the time they apply for a visa to the point that they enter the U.S. If derogatory information is developed after the visa is issued, there are points at which the suspect can be apprehended and turned over to law enforcement services. In addition, the U.S. requires the advance transmission of passenger (and crew) manifests from all U.S.-bound flights. To help ensure that cockpit crews operating to the U.S. are not compromised by terrorist elements, the FAA has instituted additional requirements for background checks on pilots, co-pilots, and flight engineers.
- U.S. aviation security experts participate fully in the work of the International Civil Aviation Organization (ICAO) to strengthen the security annex (#17) to the Chicago Convention. Many recommended practices in the current annex are expected to be elevated to mandatory standards.
- The U.S. is an active participant in the ICAO Working Group on Machine-Readable Travel Documents, which has been working for more than a decade to establish international standards for passports, other travel documents, visas, and identity cards. Current U.S. travel documents and visas con-

form to the standards developed by this group and adopted by ICAO. Many countries have also improved their documents so they are more reliable.

### **UNSCR 1373 Operative Paragraph 3**

**3(a): What steps have been taken to intensify and accelerate the exchange of operational information in the areas indicated in this sub-paragraph?**

The U.S. is making extensive efforts to accelerate the exchange of operational information in these areas with other states. Through a series of bilateral meetings and multinational conferences since September 11, senior officials have discussed the need for faster sharing of information.

- Multilaterally we have particularly worked with the Financial Action Task Force, the Egmont and Lyon Groups, the Group of 7 and Group of 20, the IMF and other international financial institutions and the Group of Eight (G-8) counter terrorism dialogue (including the Counterterrorism Experts Group).
- We have also worked with regional organizations such as the Organization of American States, the Organization of African Unity, the Association of South East Asian Nations, the European Union, the Council of Europe, the Asia Pacific Economic Cooperation forum, the Manila Framework Group and the Organization for Security and Cooperation in Europe.

### ***Exchanging Operational Information***

- Since September 11, contacts between U.S. law enforcement officials and prosecutors and foreign officials have intensified. Legal Attaches overseas and foreign police authorities regularly share criminal intelligence. Operational information is also exchanged between U.S. and foreign prosecutors. Such exchanges are facilitated through designated “central authorities” under each of the U.S. Mutual Legal Assistance Treaties

(MLATs). U.S. authorities and international organizations, such as INTERPOL, share operational information on the detection of fraudulent documents and alerts on terrorist suspects.

*Exchanging Information on Arms, Explosives and Weapons of Mass Destruction*

- The U.S. works with other nations to exchange operational information on terrorists, arms trafficking, explosives or sensitive materials, and weapons of mass destruction threats.
- We participate in multilateral export control regimes and encourage information sharing on weapons and associated technology that may be diverted to terrorists.
- Wassenaar Arrangement members recently agreed that preventing terrorist access to conventional weapons and associated dual-use items is an important new focus. We continue to take the lead in stressing the value of data exchanges on small arms/light weapons between OSCE and Wassenaar Arrangement countries.
- The U.S. National Tracing Center assists other nations to trace U.S.-origin weapons used in terrorist or criminal activities. Our assistance program for weapons stockpile management and security and destruction of surplus weapons is further sharing of information, focusing on countries with a high risk of illicit arms transfers, to keep these weapons from terrorists.
- The U.S. also exchanges information through bilateral, regional and multilateral initiatives to eliminate opportunities for terrorists to acquire weapons of mass destruction (WMD). Over 30 countries have cooperated with us to make counterterrorism an important new focus of the Australia Group (chemical/biological nonproliferation regime).
- The work of other regimes—the Missile Technology Control Regime, the Nuclear Suppliers Group, and the Zangger Committee—also is relevant to keeping sensitive technologies out of terrorists' hands.
- The U.S. works with the International Atomic Energy Agency and other organizations to increase the exchange of information aimed at strengthening controls over WMD-related



materials and technologies. This has included export control dialogues, such as the Central Asian State Export Control and Border Security Program.

- The G-8 Nonproliferation Experts Group (NPEG) develops action plans to strengthen international instruments to prevent WMD proliferation, protect sensitive materials and facilities, encourage wider adherence to the principles of international export control arrangements, reinforce and better coordinate assistance programs, and enhance information exchange on illicit trafficking of sensitive materials, technology and expertise.
- The U.S. is also a key participant in the G-7 Nuclear Safety Working Group (NSWG), which works to strengthen controls on radiological sources.

### *Technology Transfer and Skills Training*

- The U.S. uses other programs to enhance exchanges of information among law enforcement agencies. These include the Terrorist Interdiction Program (TIP), which provides information and training to identify terrorist suspects seeking to cross borders, and the Antiterrorism Assistance program, which provides assistance for border patrol and airport security. The U.S. is also helping INTERPOL to modernize equipment for faster transmission of fingerprints and other graphics to TIP participants.

### *Customs Information and Enforcement*

- Under U.S. law, air carriers must provide advance passenger information to U.S. Customs by electronic transmission and prior to arrival in the United States. With this information, law enforcement agencies should be able to screen passengers to obtain information about the movement of suspected terrorists while reducing delays for other passengers entering the United States.
- U.S Customs maintains mutual assistance agreements with other countries' customs agencies, which allow the sharing of information during an investigation on the movements of people and cargo across borders.

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**3(e): Provide any relevant information on the implementation of the conventions, protocols and resolutions referred to in this sub-paragraph?**

The U.S. is a party to ten of the twelve conventions and protocols relating to terrorism. Legislation has been enacted to fully implement:

- The Convention on Offences and Certain Other Acts Committed On Board Aircraft, 1963 (“Tokyo Convention”)<sup>35</sup>
- The Convention for the Suppression of the Unlawful Seizure of Aircraft, 1970 (“Hague Convention”)<sup>36</sup>
- The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 1971 (“Montreal Convention”)<sup>37</sup>
- The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, 1973<sup>38</sup>
- The International Convention Against the Taking of Hostages, 1979 (“Hostages Convention”)<sup>39</sup>
- The Convention on the Physical Protection of Nuclear Material, 1980<sup>40</sup>
- The Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, 1988, Supplementary to the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation<sup>41</sup>
- The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, 1988<sup>42</sup>

The Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1988<sup>43</sup>

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<sup>35</sup> 49 U.S.C. §§ 46501, 06

<sup>36</sup> 49 U.S.C. § 46501-02

<sup>37</sup> 18 U.S.C. § 31-32, 49 U.S.C. § 46501

<sup>38</sup> 18 U.S.C. §§ 112, 878, 1116 & 1201(e)

<sup>39</sup> 18 U.S.C. § 1203

<sup>40</sup> 18 U.S.C. § 831

<sup>41</sup> 18 U.S.C. § 37

<sup>42</sup> 18 U.S.C. § 2280

<sup>43</sup> 18 U.S.C. § 2281

- The Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991<sup>44</sup>
- In addition, the U.S. has signed and expects to ratify in the near future the International Convention for the Suppression of Terrorist Bombings and the International Convention for the Suppression of the Financing of Terrorism. Implementing legislation for both has been submitted to the Congress.
- The U.S. has implemented Security Council Resolutions 1269 and 1368 by working to become a party to all twelve of the conventions and protocols relating to terrorism, by fully implementing those agreements to which it is a party, and by establishing and implementing the measures discussed elsewhere in this submission.

**3(f): What legislation, procedures and mechanisms are in place for ensuring asylum seekers have not been involved in terrorist activity before granting refugee status?**

- The U.S. has several measures to ensure that asylum seekers have not been involved in terrorist activity before it grants them refugee status. A directive issued by President Bush on October 29, 2001 creates a Foreign Terrorist Tracking Task Force strengthening existing procedures. The Task Force will coordinate U.S. programs to: (1) deny entry of foreign nationals associated with, suspected of being engaged in or supporting terrorist activity; and (2) locate, detain, prosecute, or deport such foreign nationals in the U.S.
- The U.S. grants refugee status in two different forms: a) individuals applying from abroad may be admitted as refugees; b) refugees in the U.S. may be granted asylum. To be eligible for either status, an applicant must establish that he or she is unable or unwilling to return home because of past persecution or well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

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<sup>44</sup> 18 U.S.C. §§ 841(o)–(p), 842(l)–(o), 844 (a)(1) & 845(c), 19 U.S.C. § 1595a, 18 U.S.C. § 842(m)–(o)

- The U.S. is a party to the 1967 Protocol Relating to the Status of Refugees, through which it undertook obligations found in the 1951 Convention Relating to the Status of Refugees. U.S. law contains several provisions that, together, implement the grounds for exclusion of refugee status found in the 1951 Convention including denial of refugee status to those involved in terrorist activity.
- Under U.S. law, those who apply for refugee status from outside the country are generally subject to the same grounds of inadmissibility as other applicants and cannot be granted refugee status if those grounds apply. Under the law, foreign nationals who engage in terrorist activity are inadmissible (see Section 2(c) above). This provision is enforced in the overseas refugee program through a screening process that relies on applicant interviews by U.S. immigration officials, checks of appropriate information databases, and security referral procedures to review and investigate cases. Experts provide consultative guidance on questionnaires, biometrics and other security mechanisms to immigration officials who adjudicate refugee protection claims.
- Slightly different safeguards apply in the domestic program. The law excludes from asylum any person who has engaged or may engage in terrorist activity, who incites terrorist activity, or who is a knowing member of a terrorist organization. Representatives of a terrorist organization, or of certain groups whose endorsement of terrorism undermines U.S. counterterrorism efforts, are also barred from asylum. An individual may also be excluded from asylum if there are good reasons for regarding the individual as a danger to the security of the U.S., or for believing that the individual has committed a serious non-political crime. U.S. law interpreting the serious non-political crime provisions make[s] clear that, even if the crime involves political motivations, it is considered non-political if it is grossly out of proportion to the political objective, or if it involves acts of an atrocious nature. These provisions are enforced by screening procedures relying on fingerprint and identity checks and on databases that have information on criminal and terrorist activity.

**3(g):** What procedures are in place to prevent the abuse of refugee status by terrorists? Please provide details of legislation and/or administrative procedures which prevent claims of political motivation being recognized as grounds for refusing requests for the extradition of alleged terrorists.

- Once refugee or asylum status has been granted, U.S. law prohibits the abuse of such status by terrorists. The Foreign Terrorist Tracking Task Force created by Presidential Directive in October 2001 (see 3(f) above) coordinates programs to locate, detain, prosecute, or deport foreign nationals in the U.S. who are suspected of being engaged in or supporting terrorist activity.
- Persons admitted from abroad as refugees are subject to removal from the U.S. if they have engaged, or are engaged, in any terrorist activity, notwithstanding their refugee status. Also, in every case, a refugee is required to submit to inspection by INS at the end of one year. An immigration official examines the refugee to determine whether any grounds of inadmissibility apply and may deny the refugee permanent resident status on terrorism grounds.
- Similar safeguards ensure terrorists do not abuse asylum. Asylum can be terminated if it is determined that the asylee is subject to any of the bars to asylum, which include specific provisions excluding terrorists, as well as provisions excluding those who have committed serious nonpolitical crimes and those who can reasonably be regarded as a danger to the security of the U.S.
- Many modern U.S. extradition treaties provide that the political offense exception to extradition is not available for certain criminal offenses associated with terrorism, e.g. murder or other willful crimes against a head of state or family member and terrorist offenses specified in multilateral international agreements. These treaty provisions are U.S. law and have been applied in a number of cases.
- The U.S. also has signed and expects to ratify in the near future two multilateral terrorism conventions, those relating to Terrorist Bombings and Terrorist Financing, which have the effect of limiting the political offense exception to extradition.

### **3. Designation of Terrorist Organizations**

#### ***a. Designation of Foreign Terrorist Organizations***

Section 219 of the Immigration and Nationality Act provides for designation of an organization as a Foreign Terrorist Organization (“FTO”) if the organization is a “foreign organization” that “engages in terrorist activity” that “threatens the security of U.S. nationals or the security of the United States.” Immigration and Nationality Act § 219, as added by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 302, 110 Stat. 1214, 1248 (1996), and amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), and USA PATRIOT Act, *see* 4 below, § 411(c). 8 U.S.C. § 1189. 66 Fed. Reg. 51088 (October 5, 2001).

Designation of a group as an FTO makes it illegal for persons within the U.S. or subject to the jurisdiction of the United States knowingly to provide material support or resources to such a group. In addition, a U.S. financial institution that becomes aware that it has possession or control over funds in which an FTO or its agent has an interest must retain possession or control over the funds and report the funds to the Department of the Treasury. Furthermore, representatives and certain members of designated organizations are inadmissible to and, in certain circumstances, removable from the United States. Those FTOs that are also designated pursuant to Executive Order 13224 of September 23, 2001 or Executive Order 12947 of January 25, 1995, as amended by Executive Order 13099 of August 20, 1998, are also subject to additional sanctions imposed by those executive orders.

#### ***(1) Redesignation and prior designations***

On October 5, Secretary of State Colin Powell renewed the designation of 25 FTOs, including Al Qaeda. Designations under § 219 are effective for two years beginning on the date of publication in the Federal Register, after which redesignation

nation is required. The twenty-five groups redesignated on October 5 had been designated or redesignated on October 8, 1999. 64 Fed. Reg. 55112 (Oct. 8, 1999). Three additional Foreign Terrorist Organizations had been designated within the previous two years and thus did not yet require redesignation. These include The Islamic Movement of Uzbekistan (65 Fed. Reg. 57641 (Sept. 25, 2000)), the Real IRA (66 Fed. Reg. 27442 (May 16, 2001)) and the United Self Defense Forces of Colombia (66 Fed. Reg. 47054 (Sept. 10, 2001)).

In announcing the redesignation, the Secretary of State described the decision and purpose as provided in the excerpts below.

The Secretary's statement and the 2001 Report on Foreign Terrorist Organizations on the designation are available at [www.state.gov/secretary/m/2001/5255.htm](http://www.state.gov/secretary/m/2001/5255.htm).

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Today I am taking an important step in continuing our efforts to combat terrorism.

I am redesignating 25 groups as Foreign Terrorist Organizations under U.S. law. The initial designations of these groups in 1997 and 1999 are due to expire on October 8. By redesignating them as Foreign Terrorist Organizations and publishing that decision today in the *Federal Register*, we continue the measures against these terrorist groups in accordance with the provisions of the Antiterrorism and Effective Death Penalty Act. This Act makes it illegal for persons in the United States or subject to U.S. jurisdiction to provide material support to these terrorist groups; it requires U.S. financial institutions to block assets held by them; and it enables us to deny visas to representatives of these groups. I made this decision in consultation with the Attorney General and the Secretary of the Treasury after an exhaustive review of these groups' violent activities over the past two years.

Every one of these groups has continued to engage in terrorist activity over the past two years. Most of these groups—such as HAMAS, the Palestine Islamic Jihad, the Tamil Tigers, the FARC in Colombia, Basque ETA, and of course Usama bin Laden's al-Qa'ida organization—have carried out murderous

attacks on innocent people since their last designation in 1999. Others—such as the Abu Nidal Organization, Aum Shinrikyo, and the Kurdish PKK—have been less active but have nonetheless continued to plan and prepare for possible acts of terrorism. Still others—such as the Egyptian al-Jihad and the Gama'a al-Islamiyya—have provided direct support for the terrorist activities of Usama bin Ladin's network.

I did not redesignate two groups, the Japanese Red Army and the Tupac Amaru Revolutionary Movement, because I determined that the statutory criteria for redesignation had not been met. With respect to the Japanese Red Army, we have maintained close watch and exchanged information with other concerned countries, but we have not received sufficient information during the past two years to justify designation. This decision does not condone or excuse the past terrorism carried out by these groups, nor does it suggest that we now consider these groups to be legitimate. Terrorists in these organizations remain accountable for their past crimes and will continue to be subject to all other relevant U.S. laws, regulations, and statutes. We remain concerned about their potential for renewed terrorist activity and will continue to monitor them closely. If we receive new evidence of terrorist activity, I will not hesitate to redesignate these groups as Foreign Terrorist Organizations.

With these actions today, our list of designated Foreign Terrorist Organizations now stands at 28. As we embark on a long-term struggle against terrorism, I hope this list will draw the attention of foreign governments across the world to these groups and will encourage those governments to take action, as we have, to isolate these terrorist organizations, to choke off their sources of financial support, and to prevent their movement across international borders.

## *(2) Designation of additional Foreign Terrorist Organizations*

On December 26, 2001, the Secretary of State designated two additional organizations as Foreign Terrorist Organizations under § 219, 66 Fed. Reg. 66492 (Dec. 26, 2001), as described in the excerpts from the Secretary of State's announcement below.



The vicious attacks that took place on September 11 made it clear that the United States must use every tool at its disposal to combat terrorism.

Today I am taking another important step in our campaign to eliminate the scourge of terrorism. I am designating two groups, Lashkar e-Tayyiba (LET) and Jaish e-Mohammed (JEM), as Foreign Terrorist Organizations under U.S. law.

These groups, which claim to be supporting the people of Kashmir, have conducted numerous terrorist attacks in India and Pakistan. As the recent horrific attacks against the Indian parliament and the Srinagar State Legislative Assembly so clearly show, the Lashkar e-Tayyiba, Jaish e-Mohammed, and their ilk seek to assault democracy, undermine peace and stability in South Asia, and destroy relations between India and Pakistan.

By designating these groups as Foreign Terrorist Organizations and publishing that decision today in the *Federal Register*, we implement the provisions of the Antiterrorism and Effective Death Penalty Act. This Act makes it illegal for persons in the United States or subject to U.S. jurisdiction to provide material support to these terrorist groups; it requires U.S. financial institutions to block assets held by them; and it enables us to deny visas to representatives of these groups. I made this decision in consultation with the Attorney General and the Secretary of the Treasury after an exhaustive review of these groups' violent activities.

The United States looks forward to working with the governments of both India and Pakistan to shut these groups down.

#### **b. Terrorist Exclusion List**

On December 5, 2001, the Secretary of State, in consultation with the Attorney General, designated 39 groups as "terrorist organizations" under § 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(3)(B)(vi)(II), as amended by the new USA PATRIOT Act, discussed in 4 below. The list of organizations so designated is commonly referred to as the Terrorist Exclusion List. Individuals engaged in specified ways in terrorist organizations desig-

nated under this authority (as well as those designated as Foreign Terrorist Organizations, discussed in 3.a. *supra*.) are inadmissible to the United States. A Press Statement released by the Department of State on December 6, 2001 and set forth below provides further information.

The full text of the designation with a list of organizations designated is available at [www.state.gov/r/pa/prs/ps/2001/6695.htm](http://www.state.gov/r/pa/prs/ps/2001/6695.htm).

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To further protect the safety of the United States and its citizens, Secretary of State Colin L. Powell, in consultation with the Attorney General, on December 5 designated 39 groups as Terrorist Exclusion List (TEL) organizations under section 212 of the Immigration and Nationality Act, as amended by the new USA PATRIOT Act. By designating these groups, the Secretary has strengthened the United States' ability to exclude supporters of terrorism from the country or to deport them if they are found within our borders.

The campaign against terrorism will be a long one, using all the tools of statecraft. We are taking a methodical approach to all aspects of the campaign to eliminate terrorism as a threat to our way of life. This round of Terrorist Exclusion List designations is by no means the last. We will continue to expand the list as we identify and confirm additional entities that provide support to terrorists.

#### **Terrorist Exclusion List Designees: December 5, 2001**

- Al-Ittihad al-Islami (AIAI)
- Al-Wafa al-Igatha al-Islamia
- Asbat al-Ansar
- Darkazanli Company
- Salafist Group for Call and Combat (GSPC)
- Islamic Army of Aden
- Libyan Islamic Fighting Group
- Makhtab al-Khidmat
- Al-Hamati Sweets Bakeries
- Al-Nur Honey Center

- Al-Rashid Trust
- Al-Shifa Honey Press for Industry and Commerce
- Jaysh-e-Mohammed
- Jamiat al-Ta'awun al-Islamiyya
- Alex Boncayao Brigade (ABB)
- Army for the Liberation of Rwanda (ALIR) AKA: Intera-hamwe, Former Armed Forces (EX-FAR)
- First of October Antifascist Resistance Group (GRAPO) AKA: Grupo de Resistencia Anti-Fascista Premero De Octubre
- Lashkar-e-Tayyiba (LT) AKA: Army of the Righteous
- Continuity Irish Republican Army (CIRA) AKA: Continuity Army Council
- Orange Volunteers (OV)
- Red Hand Defenders (RHD)
- New People's Army (NPA)
- People Against Gangsterism and Drugs (PAGAD)
- Revolutionary United Front (RUF)
- Al-Ma'unah
- Jayshullah
- Black Star
- Anarchist Faction for Overthrow
- Red Brigades-Combatant Communist Party (BR-PCC)
- Revolutionary Proletarian Nucleus
- Turkish Hizballah
- Jerusalem Warriors
- Islamic Renewal and Reform Organization
- The Pentagon Gang
- Japanese Red Army (JRA)
- Jamiat ul-Mujahideen (JUM)
- Harakat ul Jihad i Islami (HUJI)
- The Allied Democratic Forces (ADF)
- The Lord's Resistance Army (LRA)

#### **4. USA PATRIOT Act**

On October 26, the U.S. enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 ("USA PATRIOT Act"), which significantly expanded the ability of U.S. law enforcement to inves-

tigate and prosecute persons who engage in terrorist acts. The Act provided, among other things, for enhanced foreign intelligence-gathering for antiterrorism purposes and greater sharing of law enforcement information with intelligence, foreign affairs and defense community as well as new border control authorities, including expanded authorities to receive and share information relevant to visa adjudications and tougher exclusions for aliens linked to terrorist activity.

***a. Authorities related to money-laundering and other criminal offenses***

The Act strengthened U.S. ability to combat money laundering and financial crime, focusing on offenses with international components. Among other things, it imposed obligations and restrictions on financial institutions and related businesses, particularly with respect to foreign customers (e.g., §§ 312, 313, 359); encouraged sharing of financial information, including by permitting information to be used in connection with terrorism-related intelligence activities (e.g., §§ 351, 355, 358); expanded U.S. criminal jurisdiction with respect to financial crimes (e.g., §§ 317, 377); strengthened and expanded U.S. forfeiture authorities (e.g., §§ 319, 323, 372); increased penalties for money laundering (§ 363) and counterfeiting (§§ 374 and 375) and criminalized bulk cash smuggling (§ 371). It also addressed foreign official corruption (e.g., §§ 302, 312, 315), voting by international financial institutions (§ 360), and law enforcement authority for Federal Reserve personnel (§ 364).

It also expanded State Department rewards authority to allow larger terrorism awards and make rewards available for a wider range of assistance (*see* C.6., below); created U.S. criminal jurisdiction to cover certain use and possession of biological agents or toxins (§ 801); addressed certain cyber-crime issues (e.g., §§ 217, 701, 814, 816, 1003, and 1016); and broadened U.S. criminal jurisdiction over certain crimes committed by or against U.S. nationals at U.S. missions and other U.S. facilities abroad (§ 804).

**b. Consular and immigration authorities**

In the area of consular and immigration functions, among other things, the Act provided for enhanced information sharing, both domestically and internationally, in the granting of visas. (§§ 403(a), (b), 413). Amendments to the Immigration and Nationality Act broadened provisions making ineligible applicants who have engaged in terrorist activity or who are in other ways connected to terrorist activity. (§ 411; *see* C.3.b., *supra*). Section 1006 adds an exclusion for aliens engaged in money-laundering, or who have aided and abetted money-laundering. Other provisions of the Act require technology enhancements (§§ 403(c) and 1008) and urge the implementation of an alien tracking mechanism (§ 414).

Section 412 added a new § 236A to the INA, 8 U.S.C. § 1226a, authorizing the Attorney General to trigger mandatory detention of an alien by certifying that he has “reasonable grounds to believe” that the alien is covered by specific provisions of the Immigration and Nationality Act making aliens excludable or removable on national security or terrorist grounds, or is engaged “in any other activity that endangers the national security of the United States.” An alien detained on the basis of such a certification must be placed in removal proceedings or charged with a criminal offense no later than 7 days after the commencement of detention. The section also requires periodic review of certifications and reports on use of the authority to Congress.

**c. Amendments to International Emergency Economic Powers Act**

The USA PATRIOT Act also amended the International Emergency Economic Powers Act (“IEEPA”), on which the President relied, for instance, in issuing Executive Order 13224, discussed in C.1. of this chapter. IEEPA authorizes the President to take certain actions “to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if

the President declares a national emergency with respect to such threat.” 50 U.S.C. § 1701. The President is authorized, among other things, to investigate, regulate and take certain other actions concerning, transactions related to “any property in which any foreign country or a national thereof has any interest.” 50 U.S.C. § 1702, note.

Section 106 of the USA PATRIOT Act amended § 1702(a)(1) to authorize the President to block such property while an investigation is pending. 50 U.S.C. § 1702(a)(1)(B). Furthermore, it added a new subparagraph providing the President with limited vesting authority over such property “when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals” 50 U.S.C. § 1702(a)(1)(C). Finally, if a determination was based on classified information, § 1702(c) now expressly provides that such information may be reviewed by a court *ex parte* and *in camera* in any judicial review of the determination.

Amendments to the Trade Sanctions Reform and Export Enhancement Act, also affecting sanctions, are discussed in Chapter 16.G., *supra*.

In signing the bill into law on October 26, 2001, the President commented on the significance of the new legislation, as excerpted below.

The full text of the President’s comments is available at 37 WEEKLY COMP. PRES. DOC. 1550 (Oct. 29, 2001).

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THE PRESIDENT: . . . Today, we take an essential step in defeating terrorism, while protecting the constitutional rights of all Americans. With my signature, this law will give intelligence and law enforcement officials important new tools to fight a present danger.

\* \* \* \*

. . . . We’re dealing with terrorists who operate by highly sophisticated methods and technologies, some of which were not even available when our existing laws were written. The bill before me takes account of the new realities and dangers posed by modern terrorists. It will help law enforcement to identify, to dis-

mantle, to disrupt, and to punish terrorists before they strike.

For example, this legislation gives law enforcement officials better tools to put an end to financial counterfeiting, smuggling and money-laundering. Secondly, it gives intelligence operations and criminal operations the chance to operate not on separate tracks, but to share vital information so necessary to disrupt a terrorist attack before it occurs.

As of today, we're changing the laws governing information-sharing. And as importantly, we're changing the culture of our various agencies that fight terrorism. Countering and investigating terrorist activity is the number one priority for both law enforcement and intelligence agencies.

Surveillance of communications is another essential tool to pursue and stop terrorists. The existing law was written in the era of rotary telephones. This new law that I sign today will allow surveillance of all communications used by terrorists, including e-mails, the Internet, and cell phones.

As of today, we'll be able to better meet the technological challenges posed by this proliferation of communications technology. Investigations are often slowed by limit on the reach of federal search warrants.

Law enforcement agencies have to get a new warrant for each new district they investigate, even when they're after the same suspect. Under this new law, warrants are valid across all districts and across all states. And, finally, the new legislation greatly enhances the penalties that will fall on terrorists or anyone who helps them.

Current statutes deal more severely with drug-traffickers than with terrorists. That changes today. We are enacting new and harsh penalties for possession of biological weapons. We're making it easier to seize the assets of groups and individuals involved in terrorism. The government will have wider latitude in deporting known terrorists and their supporters. The statute of limitations on terrorist acts will be lengthened, as will prison sentences for terrorists.

\* \* \* \*

This legislation is essential not only to pursuing and punishing terrorists, but also preventing more atrocities in the hands of the evil ones. This government will enforce this law with all the urgency

of a nation at war. The elected branches of our government, and both political parties, are united in our resolve to fight and stop and punish those who would do harm to the American people.

\* \* \* \*

## **5. Homeland Security Office**

### ***a. Executive Order 13228***

On October 8, 2001, President George W. Bush issued Executive Order 13228 Establishing the Office of Homeland Security and the Homeland Security Council. 66 Fed.Reg. 51812 (Oct. 8, 2001). The excerpts below set forth the mission and functions of the Office in “secur[ing] the United States from terrorist threats or attacks.”

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By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

Section 1. Establishment. I hereby establish within the Executive Office of the President an Office of Homeland Security (the “Office”) to be headed by the Assistant to the President for Homeland Security.

Sec. 2. Mission. The mission of the Office shall be to develop and coordinate the implementation of a comprehensive national strategy to secure the United States from terrorist threats or attacks. The Office shall perform the functions necessary to carry out this mission, including the functions specified in section 3 of this order.

Sec. 3. Functions. The functions of the Office shall be to coordinate the executive branch’s efforts to detect, prepare for, prevent, protect against, respond to, and recover from terrorist attacks within the United States.

(a) National Strategy. The Office shall work with executive departments and agencies, State and local governments, and private entities to ensure the adequacy of the national strategy for detecting, preparing for, preventing, protecting against, respond-



ing to, and recovering from terrorist threats or attacks within the United States and shall periodically review and coordinate revisions to that strategy as necessary.

(b) Detection. The Office shall identify priorities and coordinate efforts for collection and analysis of information within the United States regarding threats of terrorism against the United States and activities of terrorists or terrorist groups within the United States. The Office also shall identify, in coordination with the Assistant to the President for National Security Affairs, priorities for collection of intelligence outside the United States regarding threats of terrorism within the United States.

(i) In performing these functions, the Office shall work with Federal, State, and local agencies, as appropriate, to:

(A) facilitate collection from State and local governments and private entities of information pertaining to terrorist threats or activities within the United States;

(B) coordinate and prioritize the requirements for foreign intelligence relating to terrorism within the United States of executive departments and agencies responsible for homeland security and provide these requirements and priorities to the Director of Central Intelligence and other agencies responsible for collection of foreign intelligence;

(C) coordinate efforts to ensure that all executive departments and agencies that have intelligence collection responsibilities have sufficient technological capabilities and resources to collect intelligence and data relating to terrorist activities or possible terrorist acts within the United States, working with the Assistant to the President for National Security Affairs, as appropriate;

(D) coordinate development of monitoring protocols and equipment for use in detecting the release of biological, chemical, and radiological hazards; and

(E) ensure that, to the extent permitted by law, all appropriate and necessary intelligence and law enforcement information relating to homeland security is disseminated to and exchanged among appropriate executive departments and agencies responsible for homeland security and, where appropriate for reasons of homeland security, promote exchange of such information with and among State and local governments and private entities.

(ii) Executive departments and agencies shall, to the extent permitted by law, make available to the Office all information relating to terrorist threats and activities within the United States.

(c) Preparedness. The Office of Homeland Security shall coordinate national efforts to prepare for and mitigate the consequences of terrorist threats or attacks within the United States. . . .

\* \* \* \*

(d) Prevention. The Office shall coordinate efforts to prevent terrorist attacks within the United States. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) facilitate the exchange of information among such agencies relating to immigration and visa matters and shipments of cargo; and, working with the Assistant to the President for National Security Affairs, ensure coordination among such agencies to prevent the entry of terrorists and terrorist materials and supplies into the United States and facilitate removal of such terrorists from the United States, when appropriate;

(ii) coordinate efforts to investigate terrorist threats and attacks within the United States; and

(iii) coordinate efforts to improve the security of United States borders, territorial waters, and airspace in order to prevent acts of terrorism within the United States, working with the Assistant to the President for National Security Affairs, when appropriate.

(e) Protection. The Office shall coordinate efforts to protect the United States and its critical infrastructure from the consequences of terrorist attacks. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) strengthen measures for protecting energy production, transmission, and distribution services and critical facilities; other utilities; telecommunications; facilities that produce, use, store, or dispose of nuclear material; and other critical infrastructure services and critical facilities within the United States from terrorist attack;

(ii) coordinate efforts to protect critical public and privately owned information systems within the United States from terrorist attack;

(iii) develop criteria for reviewing whether appropriate security measures are in place at major public and privately owned facilities within the United States;

(iv) coordinate domestic efforts to ensure that special events determined by appropriate senior officials to have national significance are protected from terrorist attack;

(v) coordinate efforts to protect transportation systems within the United States, including railways, highways, shipping, ports and waterways, and airports and civilian aircraft, from terrorist attack;

(vi) coordinate efforts to protect United States livestock, agriculture, and systems for the provision of water and food for human use and consumption from terrorist attack; and

(vii) coordinate efforts to prevent unauthorized access to, development of, and unlawful importation into the United States of, chemical, biological, radiological, nuclear, explosive, or other related materials that have the potential to be used in terrorist attacks.

(f) **Response and Recovery.** The Office shall coordinate efforts to respond to and promote recovery from terrorist threats or attacks within the United States. In performing this function, the Office shall work with Federal, State, and local agencies, and private entities, as appropriate, to:

(i) coordinate efforts to ensure rapid restoration of transportation systems, energy production, transmission, and distribution systems; telecommunications; other utilities; and other critical infrastructure facilities after disruption by a terrorist threat or attack;

(ii) coordinate efforts to ensure rapid restoration of public and private critical information systems after disruption by a terrorist threat or attack;

(iii) work with the National Economic Council to coordinate efforts to stabilize United States financial markets after a terrorist threat or attack and manage the immediate economic and financial consequences of the incident;

(iv) coordinate Federal plans and programs to provide medical, financial, and other assistance to victims of terrorist attacks and their families; and

(v) coordinate containment and removal of biological, chem-

ical, radiological, explosive, or other hazardous materials in the event of a terrorist threat or attack involving such hazards and coordinate efforts to mitigate the effects of such an attack.

\* \* \* \*

***b. Directive concerning immigration policies***

Homeland Security Presidential Directive-2, issued October 29, 2001, Combating Terrorism through Immigration Policies, provides for the creation of the Foreign Terrorist Tracking Task Force, enhanced INS and Customs enforcement capability, prevention of abuse of international student status, negotiation of complementary immigration policies within North America, and use of advanced technologies for data sharing and enforcement efforts. 37 WEEKLY COMP. PRES. DOC.1570 (Nov. 5, 2001). The policy of the Directive was summarized as follows:

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The United States has a long and valued tradition of welcoming immigrants and visitors. But the attacks of September 11, 2001, showed that some come to the United States to commit terrorist acts, to raise funds for illegal terrorist activities, or to provide other support for terrorist operations, here and abroad. It is the policy of the United States to work aggressively to prevent aliens who engage in or support terrorist activity from entering the United States and to detain, prosecute, or deport any such aliens who are within the United States.

\* \* \* \*

**6. Rewards for Justice Program**

On December 13, 2001, the Secretary of State announced that he had authorized a reward of up to \$25 million for information leading to the capture of Usama bin Laden and other key al-Qaeda leaders under § 502 of the USA PATRIOT Act authorizing rewards greater than the previous limit of \$5 million, in certain circumstances. The Secretary also announced

a new domestic program of public service announcements for the Rewards for Justice Program, including availability of rewards up to \$25 million for information that prevents an act of international terrorism against U.S. persons or property, or brings to justice persons who have committed such an act. Excerpts from the public announcement are provided below.

The full text of the press briefing by Secretary Powell, Under Secretary for Public Affairs Charlotte Beers and Assistant Secretary of State for Diplomatic Security David Carpenter is available at [www.state.gov/secretary/rm/2001/dec/6844.htm](http://www.state.gov/secretary/rm/2001/dec/6844.htm).

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### Secretary Powell:

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I am pleased to be here with all of you today to announce the rollout of the domestic Public Service Announcements for the Rewards for Justice Program. These Public Service Announcements make partners of the American Government and the American people in the fight against terrorism.

Since 1984, the Rewards for Justice Program, run by the Department of State's Bureau of Diplomatic Security, has been one of the most valuable United States Government assets in our fight against international terrorism. In . . . past years, this program has allowed Secretaries of State to offer rewards of up to \$5 million for information that prevents acts of international terrorism against the United States' persons or property, and brings to justice those who have committed such acts.

The United States of America Patriot Act of 2001, signed into law in October, authorizes the Secretary of State to now offer rewards greater than \$5 million, if it is determined that a greater amount is necessary to combat terrorism or defend the United States against such acts.

Through this piece of congressional legislation, I have authorized up to a \$25 million reward for information leading to the capture of Usama bin Laden and other key al-Qaida leaders.

Congress acted swiftly and decisively to provide us with the funding for this program. Senators Hollings and Gregg and Representatives Wolf and Serrano led the initiative to pass this legislation, and it will be an invaluable tool in the fight against terrorism.

I would also like to thank the Rewards for Justice Fund, ordinary people who have donated their time and energy and substantial resources to assist in the fight against terrorism. This fund will allow every American to take part in the fight against terrorism, and every dollar donated to the Rewards for Justice Fund directly supports the Rewards for Justice Program.

Today, for the first time, we are rolling out an extensive domestic media campaign to support the Rewards for Justice Program. This campaign will distribute public service announcements to every major media market in the United States. And we have got some commitments from major radio stations and newspapers across the country that they will run these public service announcements.

I strongly encourage every newspaper and radio station to run the ads and join us in this fight. The Rewards for Justice Program works. It has helped root out terrorists in more than 20 cases around the world, including the case of Ramsey Yousef, who is now behind bars for his role in the 1993 World Trade Center bombing. People with information of any past or planned act for international terrorism against the United States anywhere in the world can contact the nearest FBI office or the Bureau of Diplomatic Security through the websites and 1-800 numbers that you see in front of you on various placards and you will hear more about in a moment.

Terrorism threatens the security of all people. We are more determined than ever to fight it. The United States has tracked terrorists aggressively and made them pay for their crimes. Through this program, thousands of innocent lives around the world have been saved through the prevention of terrorist attacks. Without question, the Rewards for Justice Program is an extremely effective weapon in the United States arsenal to combat terrorism and the threat of international terrorism.

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## **D. INTERNATIONAL SUPPORT AND COOPERATION**

### **1. European Union**

#### ***a. U.S.-EU Ministerial Statement on Combating Terrorism***

On September 20, 2001, the United States and the European Union issued a Ministerial Statement on Combating Terrorism, providing as follows:

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In the coming days, weeks and months, the United States and the European Union will work in partnership in a broad coalition to combat the evil of terrorism. We will act jointly to expand and improve this cooperation worldwide. Those responsible for the recent attacks must be tracked down and held to account. We will mount a comprehensive, systematic and sustained effort to eliminate international terrorism—its leaders, its actors, its networks. Those responsible for aiding, supporting or harboring the perpetrators, organizers and sponsors of these acts will be held accountable. Given the events of September 11, 2001 it is imperative that we continue to develop practical measures to prevent terrorists from operating.

Our resolve is a reflection of the strength of the U.S.-EU relationship, our shared values, and our determination to address together the new challenges we face. The nature of our democratic societies makes it imperative to protect our citizens from terrorist acts, while at the same time protecting their individual liberties, due process, and the rule of law. The U.S. and the EU are committed to enhancing security measures, legislation and enforcement. We will work together to encourage greater cooperation in international fora and wider implementation of international instruments. We will also cooperate in global efforts to bring to justice perpetrators of past attacks and to eliminate the ability of terrorists to plan and carry out future atrocities. We have agreed today that the United States and the EU will vigorously pursue cooperation in the following areas in order to reduce vulnerabilities in our societies:

- Aviation and other transport security
- Police and judicial cooperation, including extradition
- Denial of financing of terrorism, including financial sanctions
- Denial of other means of support to terrorists
- Export control and nonproliferation
- Border controls, including visa and document security issues
- Law enforcement access to information and exchange of electronic data

***b. U.S.-Europol agreement***

On December 6, 2001, the United States entered into an agreement with the European Police Office (Europol) Concerning Mutual Cooperation in Law Enforcement Matters. The new agreement permits the exchange of analytic data on crime but not information on particular persons. While the United States has cooperative relations with police entities in many individual European countries, it had not previously had a formal working relationship with Europol.<sup>4</sup> Secretary of State Colin Powell welcomed the Europol Agreement and other cooperation with Europe in remarks at the EU Justice and Home Affairs Council on the same date.

The full text of Secretary Powell's remarks is available at [www.state.gov/secretary/m/2001/dec/6702.htm](http://www.state.gov/secretary/m/2001/dec/6702.htm).

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September 11th changed our world. In the aftermath of these terrible acts of terrorism, we have emerged stronger and more unified in defense of our security, our values, and our way of life.

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<sup>4</sup> Europol was established by the Europol Convention of 1995, based on Article K.3 of the Treaty on European Union (Maastricht 1992). It became operational in 1999, charged with, among other things, improving "the effectiveness and cooperation of the competent authorities in the [EU] member states in preventing and combating terrorism, unlawful drug trafficking and other serious forms of international crime. . . ."



Only a few months ago, cynics argued that the United States and Europe were drifting apart, caught up in squabbles over trade issues, bananas and the like. But now we know better. The European Union's swift and resolute support for the United States reflects the powerful and enduring bonds between our societies and the bedrock values that we share. You are our staunchest foul weather friend and we know it.

Cooperation in justice and law enforcement is essential to our common struggle against terrorism. Due in great part to the work of this Council, our judicial and police authorities have new tools to combat terrorism and to shut off terrorist financing. We are working with the provisional EUROJUST to enable our prosecutors to exchange information on terrorism. The U.S.-EUROPOL Agreement we sign today undergirds the new framework for law enforcement cooperation.

There is still much more to do. This Council is considering ways to facilitate the sharing of law enforcement information between the United States and European authorities. This is a complex issue, in part because of the differences in our legal systems, but it is hard to see how we can work together in criminal investigations without sharing data. I know we can resolve this issue and I hope we can resolve it quickly.

The European Union joined us in freezing the assets linked to the attacks. Now we need to take additional steps to halt the flow of terrorist financing. We must be able to move quickly and sometimes even on the basis of sensitive intelligence. It is essential to have the capacity to freeze assets expeditiously on an EU-wide basis. I am heartened by the progress the EU has made on a framework regulation that will meet this need and I urge its final passage.

**c. *Council of the European Union***

The Council of the European Union adopted Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism (2001/93/CFSP) and Council Regulation 2580/2001 implementing the Common Position. In a Press Statement of December 28, 2001, the United States welcomed these actions, as follows:

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The United States welcomes the actions taken December 28 by the Council of the European Union, which constitute another important contribution to the continuing fight against terrorism and reflect the EU's determination to "combat terrorism in every shape and form." The Council has adopted a "common position," a framework regulation, and an implementing decision that significantly strengthen its legal and administrative ability, and that of EU member states, to take action against terrorists and their supporters—including freezing their assets.

The decisions also lay the foundation for even greater cooperation among EU member states in anti-terrorism efforts. The EU has specifically identified, and listed, a number of individuals and entities against whom asset-freezes and other measures are to be applied.

We have always emphasized that international cooperation is vital in combating terrorism. The EU actions complement our own efforts. They also provide implementing measures in line with the provisions of United Nations Security Council Resolution 1373 on combating terrorism.

## **2. International Civil Aviation Organization Assembly**

The International Civil Aviation Organization Assembly issued a Resolution on October 5, recognizing that the actions of September 11 "constitute . . . use of civil aircraft for an armed attack on civilized society and are incompatible with international law: and urged all Contracting States to "hold accountable and punish severely those who misuse civil aircraft as weapons for destruction, including those responsible for planning and organizing such acts or for siding, supporting or harbouring the perpetrators." It also urged all Contracting States to take a number of steps to tighten aviation security, while committing ICAO to address new and emerging threats to civil aviation. Resolution A33-1, Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation. The text of Resolution A33-1 is available at [www.icao.int/icao/en/assembly/a33/resolutions\\_a33.pdf](http://www.icao.int/icao/en/assembly/a33/resolutions_a33.pdf).

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### **3. Asia Pacific Economic Cooperation**

A meeting of APEC leaders, including President Bush, in Shanghai on October 21, 2001, issued a Leaders Statement on Counter-terrorism, excerpted below.

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1. Leaders unequivocally condemn in the strongest terms the terrorist attacks in the United States on September 11, 2001, and express their deepest sympathy and condolences to the victims of a large number of nationalities and their families and to the people and Government of the United States of America.

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6. Leaders are determined to enhance counter-terrorism cooperation in line with specific circumstances in their respective economies, through:

- Appropriate financial measures to prevent the flow of funds to terrorists, including accelerating work on combating financial crimes through APEC Finance Ministers' working Group on Fighting Financial Crime and increasing involvement in related international standard-setting bodies;
- Adherence by all economies to relevant international requirements for the security of air and maritime transportation. Leaders call on Transport Ministers to actively take part in the discussions on enhancing airport, aircraft, and port security, achieve effective outcomes as early as possible, and assure full implementation and cooperation in this regard;
- Strengthening of energy security in the region through the mechanism of the APEC Energy Security Initiative, which examines measures to respond to temporary supply disruptions and longer-term challenges facing the region's energy supply;
- Strengthening of APEC activities in the area of critical sector protection, including telecommunications, transportation, health and energy.
- Enhancement of customs communication networks and expeditious development of a global integrated electronic customs network, which would allow customs authorities to better

enforce laws while minimizing the impact on the flow of trade.

- Cooperation to develop electronic movement records systems that will enhance border security while ensuring movement of legitimate travelers is not disrupted.
- Strengthening capacity building and economic and technical cooperation to enable member economies to put into place and enforce effective counter-terrorism measures.
- Cooperation to limit the economic fallout from the attacks and move to restore economic confidence in the region through policies and measures to increase economic growth as well as ensure stable environment for trade, investment, travel and tourism.

7. Leaders also pledge to cooperate fully to ensure that international terrorism does not disrupt economies and markets, through close communication and cooperation among economic policy and financial authorities.

#### **4. International Maritime Organization**

On November 20, 2001, the International Maritime Organization adopted a Resolution recognizing the threat to the safety of ships and security of passengers and crews inherent in the events of September 11 and taking note of existing instruments related to promoting such security. Resolution A.924(22). Among other things, the Resolution

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. . . [r]equests the Maritime Safety Committee, the Legal Committee and the Facilitation Committee, under the direction of the Council, to undertake, on a high priority basis, a review to ascertain whether there is a need to update the instruments referred to in the preambular paragraphs and any other relevant IMO instrument under their scope and/or to adopt other security measures and, in the light of such a review, to take prompt action as appropriate.

## 5. Organization for Security and Cooperation in Europe

On December 4, 2001, foreign ministers of 55 countries, including the United States, attending a meeting of the Organization for Security and Cooperation in Europe in Bucharest, Romania, unanimously adopted a plan including enhanced police cooperation and steps to deprive terrorist groups of access to international finances.

The Decision on Combating Terrorism, excerpted below, and the Bucharest Plan of Action for Combating Terrorism are available at <http://www.osce.org/docs/english/1990-1999/mcs/gbuch01e.htm>.

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The OSCE participating States pledge to reinforce and develop bilateral and multilateral co-operation within the OSCE, with the United Nations and with other international and regional organizations, in order to combat terrorism in all its forms and manifestations, wherever and by whomever committed. As a regional arrangement under Chapter VIII of the Charter of the United Nations, the OSCE is determined to contribute to the fulfilment of international obligations as enshrined, *inter alia*, in United Nations Security Council resolution 1373 (2001), and will act in conformity with the purposes and principles of the Charter of the United Nations. The OSCE participating States pledge to become parties to all 12 United Nations conventions and protocols related to terrorism as soon as possible. They call for a speedy finalization of negotiations for a Comprehensive United Nations Convention on International Terrorism.

The OSCE participating States have come together in political solidarity to take joint action. They look forward to the substantive contribution that the Bishkek International Conference on Enhancing Security and Stability in Central Asia, to be held on 13 and 14 December 2001, can render to global anti-terrorism efforts, and will support, also through technical assistance, the Central Asian partners, on their request, in countering external threats related to terrorism.

To that end, the OSCE Ministerial Council adopts The Bucharest Plan of Action for Combating Terrorism, annexed to this Decision.



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